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No. 749

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IN THE

SUPREME COURT

of the United States

GREAT LAKES STEEL CORPORATION,
a Delaware corporation,

Plaintiff-Appellant,

vs.

UNITED STATES OF AMERICA,

Defendant-Appellee,

INTERSTATE COMMERCE COMMISSION,
THE BALTIMORE AND OHIO RAILROAD COMPANY,
ERIE RAILROAD COMPANY, and
THE PENNSYLVANIA RAILROAD COMPANY,

Intervening Defendants-Appellees.

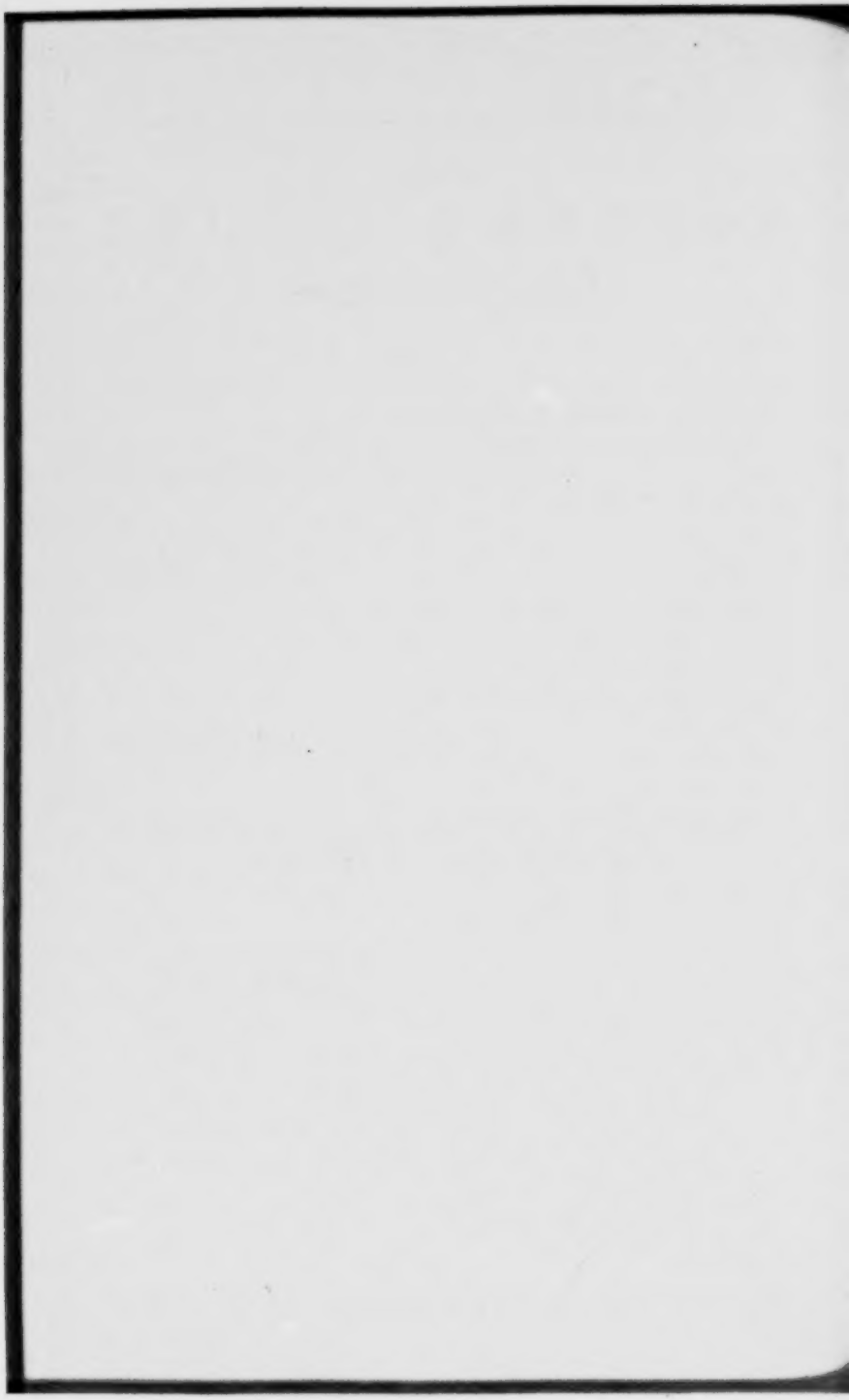
BRIEF OF PLAINTIFF IN OPPOSITION TO MOTION TO AFFIRM

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GREAT LAKES STEEL CORPORATION,
a Delaware corporation,

Plaintiff-Appellant,

vs.

UNITED STATES OF AMERICA,

Defendant-Appellee,

INTERSTATE COMMERCE COMMISSION,
THE BALTIMORE AND OHIO RAILROAD COMPANY,
ERIE RAILROAD COMPANY, and
THE PENNSYLVANIA RAILROAD COMPANY,

Intervening Defendants-Appellees.

BRIEF OF PLAINTIFF IN OPPOSITION TO MOTION TO AFFIRM

STATEMENT OF THE CASE

(Emphasis has been supplied unless the context indicates otherwise.)

This is an appeal under 28 U.S.C.A. 47(a) from a judgment of a three-judge District Court for the Eastern District of Michigan, Southern Division, dismissing a complaint filed under the Urgent Deficiencies Act (28 U.S.C.A. 44 et seq.) to review an order of the Interstate Commerce Commission. The judgment of the lower court dismissing the complaint was based on the court's conclusion that it had no jurisdiction of the complaint under either the

Urgent Deficiencies Act or the Administrative Procedure Act. The lower court did not pass on the merits of plaintiff's complaint.

The suit was filed only against the United States as provided by 28 U.S.C.A. 46. The Interstate Commerce Commission and the railroads against which the complaint before the Commission was filed intervened as defendants. One motion to affirm was filed by the Interstate Commerce Commission and one by the railroads which intervened as defendants in the proceeding. Both motions assert in accordance with Supreme Court Rule 7(4) that the questions on which the decision of the cause depends are so unsubstantial as to not to need further argument. No attack was made on the jurisdiction of this court.

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STATEMENT OF FACTS

On September 4, 1944, plaintiff filed a complaint with the Interstate Commerce Commission against the Baltimore and Ohio Railroad Company, Erie Railroad Company and The Pennsylvania Railroad Company. The complaint alleged that plaintiff was then engaged in the manufacture of iron and steel articles in a plant at Mansfield, Ohio; that in the course of its business it shipped and would continue to ship from origin points within the States of Michigan, New York and Rhode Island carload shipments of iron and steel articles to complainant's said plant at Mansfield, Ohio, for the purpose of fabrication and re-shipment; that such shipments were entitled to the transit privileges authorized in three tariffs designated in the complaint, one of such tariffs having been filed with the Interstate Commerce Commission by each of the three railroads involved; that complainant had taken the necessary steps to comply with the rules and conditions of said tariffs to entitle it to the benefit of the transit privileges provided for therein; that the railroads had declined to grant complainant the benefit of said transit privileges and that such refusal on the part of the railroads subjected complainant to the payment of rates and charges for transportation which were illegal and unlawful and in violation of Section 6(7) of the Interstate Commerce Act to the extent that the charges collected were greater than the lawful charges provided for in said transit tariffs and would continue to be illegal and unlawful and in violation of Section 6(7) of the Interstate Commerce Act on similar shipments then being made and which would thereafter be made. Complainant prayed for an order requiring

the carriers to cease and desist from such violations of the Interstate Commerce Act and to pay complainant such amount as the railroads might have collected in violation of the Interstate Commerce Act.

After a hearing before an examiner who filed a proposed report to which exceptions were taken and argued orally before Division 2 of the Interstate Commerce Commission, the Division, on May 28, 1946, filed its report determining that plaintiff was not entitled to the transit privileges accorded by the transit tariffs because, as the Division held, the continuity of the shipments was terminated at Mansfield. Prior to the determination of the Commission, plaintiff had ceased operations at Mansfield so the question of the applicability of the tariffs for the future thereupon became moot. Pursuant to the report of Division 2, the Commission entered an order May 28, 1946, dismissing the complaint. Timely petition for rehearing and for reconsideration before the entire Commission was filed and such petition was denied November 4, 1946.

On January 13, 1947, a complaint was filed in the District Court for the Eastern District of Michigan (that being the district in which the principal office and place of business of plaintiff is located) against the United States, setting forth the facts with respect to the proceeding before the Interstate Commerce Commission and attacking the decision of the Commission on the ground that it was contrary to law, was wholly unsupported by substantial competent evidence, was contrary to the evidence, was arbitrary and was based on erroneous conclusions. The complaint asked that the court set aside, annul and

suspend the order of the Interstate Commerce Commission and remand the cause to the Commission, "commanding the said Commission to take such further action in said cause as may not be inconsistent with the court's determination." There was also a prayer for general relief but no injunction, temporary or permanent, was sought. Answers were filed by the United States and also by the intervening defendants. The intervening defendants in their answer challenged the jurisdiction of the court. The case was tried before a three-judge District Court pursuant to the provisions of the Urgent Deficiencies Act and, on December 22, 1948, an opinion was filed holding that the court was without jurisdiction of the case. The only evidence introduced at the hearing before the court was the record of the proceedings before the Commission and the evidence presented to the Commission. Judgment of dismissal was entered December 22, 1948. Appeal was sought and allowed February 18, 1949. The jurisdictional statement, assignment of errors and other papers required by law and court rules were timely filed and served. Motion of the Interstate Commerce Commission to affirm the judgment of the lower court was received by counsel for plaintiff March 7, 1949, and the motion by the intervening railroads, March 10, 1949. Both of said motions claim that plaintiff's appeal is without merit both on the jurisdictional question and on the merits of the case.

ARGUMENT

The Jurisdiction of the District Court

The District Court dismissed the case because of the construction placed by it on Section 9 of the Interstate Commerce Act (49 U.S.C.A. 9). This section grants to any person claiming to be damaged by a carrier subject to the Act the right either to make complaint to the Interstate Commerce Commission or to bring suit for the recovery of the damages for which the carrier may be liable in any District Court of the United States, but prohibits the exercise of both of said remedies and requires that in each case the injured party elect which of the two methods of procedure he will adopt. The lower court held that this suit was a "suit for damages" as the term is used in Section 9 of the Act and that since plaintiff had already filed a complaint with the Commission, the suit to review the Commission's order was an attempt to exercise both of the alternative remedies provided for in Section 9 of the Interstate Commerce Act. The court based its holding in this respect principally on *Standard Oil Company vs. United States,* 283 U. S. 235. This is the principal case relied on by all defendants in support of their claim that the District Court had no jurisdiction of this suit. Defendants contended, and the lower court held, that Standard Oil Company vs. United States determined that a suit under the Urgent Deficiencies Act to review a decision of the Interstate Commerce Commission dismissing a complaint for damages is barred by the election of remedies provision of Section 9 of the Interstate Commerce Act. Plaintiff contends that Standard Oil Company vs. United State did not hold what defendants contend and the lower court decided it held. Plaintiff further contends that if Standard Oil Company vs. United States did hold what

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the lower court in this case determined it held, then Standard Oil Company vs. United States has been erroneously decided and should be specifically overruled at this time on the election of remedies theory as it has already been overruled on the negative order doctrine by *Rochester Telephone Company vs. United States,* 307 U. S. 125.

Standard Oil Co. vs. U. S. Does Not Support Opinion of District Court

We will consider first the opinion in Standard Oil Company vs. United States to determine exactly what was held in that case with respect to the election of remedies afforded by Section 9 of the Interstate Commerce Act. That portion of the opinion in Standard Oil Company vs. United States which it is claimed determines that the court has no jurisdiction of this case appears on pages 240 and 241 of 283 U. S. However, before analyzing this portion of the court's opinion, we think it well to review the history of the Standard Oil Company litigation and the various other points decided by the case.

The facts in the *Standard Oil Company* case are stated in the opinion of the District Court (41 F. (2d) 836) as follows:

> "Prior to filing this suit the petitioner had filed two complaints with the Interstate Commerce Commission, hereinafter referred to as the Commission, alleging that the respondent carriers had collected from petitioner, between November 27, 1920, and November 1, 1923, freight charges on certain shipments of petroleum and petroleum products based

upon rates contained in freight tariffs which were not applicable, and, therefore, were in violation of Section 6 of the Interstate Commerce Act as amended (49 U.S.C.A. §6). In those complaints petitioner contended that if proper freight tariffs had been applied, lesser charges would have accrued, and that it was entitled to a refund of the difference between the charges collected under the tariffs which the respondent carriers applied, and which the petitioner claimed were not applicable, and the charges provided for under the tariffs which the petitioner claims were applicable." (837)

After a hearing, the complaints were dismissed by the Commission, the Commission finding that the rates charged by the carriers were the lawful rates. Standard Oil Company then filed a petition with the District Court under the Urgent Deficiencies Act asking the court to enter a decree adjudging the orders of the Commission to be null and void in all respects, and ordering the same to be abrogated, cancelled and set aside, and that the Commission be directed by the court to enter an order in both causes granting the prayers of the complaints and finding that the company had been overcharged as prayed.

After referring to the negative order doctrine laid down by the Supreme Court in *Procter and Gamble Co. vs. United States,* 225 U. S. 282, the District Court said:

"The petitioner, however, contends:

"First. That the complaints which it originally filed with the Commission involved only the construction or interpretation of certain tariffs which were conceded to have been in effect at the time the shipments moved; that all shipments were routed by the shipper in accordance with the tariffs in effect; that the questions presented were therefore

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purely matters of law and did not require the exercise by the Commission of any of its administrative functions, and are therefore reviewable by this court.

"Second. That this court can review an order of the Commission holding a given rate or regulation just, reasonable, or not discriminatory, if the holding is wrong as a matter of law, which it claims is true in the instant case.

"Third. That the orders of dismissal were a determination of a right on the one hand and of an obligation on the other, and that this court may review such orders even though negative in form.

"Fourth. That the orders of the Commission, though negative in form, are affirmative in effect, and therefore reviewable.

"It may be conceded that an order of the Commission which involves solely matters of law, and which does not involve the Commission's administrative functions, may be reviewed by the courts; and though the order be negative in form yet affirmative in effect, it is still subject to review, but such review must be had *in the manner provided by law.*" (838)

The court, after reviewing the decision of the Commission, then said:

"While questions of tariff interpretation may in some instances involve purely a question of law, in many instances such interpretation involves preliminary determination of facts which must be made before a court can assume jurisdiction, and in such instances resort must first be had to the Commission. *Great Northern Railway Co. vs. Merchants Elevator Co.*, 259 U. S. 285, 42 S. Ct. 477, 66 L. Ed. 943.

"The complaints filed with the Commission sought reparation upon petitioner's contention that the intermediate rule and the combination rule applied to

> the shipments in question. Thus the Commission was called upon to determine whether the rates made and claimed by petitioner under those rules were applicable, or whether some other rate was applicable to the shipments described * * *." (841)
>
> * * *
>
> "In our judgment, therefore, there is no basis for the allegation that the case presented no question necessitating the exercise of the Commission's administrative functions. On the contrary, we think it was a case in which preliminary resort to the Commission was required. This having been sought by petitioner and having received a negative finding, it falls within the rule laid down in the case of *Procter & Gamble Co. vs. United States,* supra, and it is not subject to review by this court." (842)

In respect to Section 9 of the Interstate Commerce Act, the court said:

> "If, as petitioner now contends, the sole question presented to the Commission for determination was one of law, then petitioner had, under the provisions of Section 9 of the Interstate Commerce Act (24 Stat. 379, U. S. Code, Title 49, §9 (49 U.S.C.A. §9)), the right and privilege originally either to make complaint to the Commission or to bring suit in a District or Circuit Court of the United States of competent jurisdiction for the recovery of the damages it claims to have sustained, but had not the right to pursue both of said remedies; and, having elected to make complaint to the Commission and having obtained the Commission's decision, petitioner has exhausted its rights and may not now in the courts pursue the alternative remedy." (842)

This is not a holding that any order denying reparation cannot be reviewed. At most it holds (and if it does we

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believe it erroneous) that *where there is a right of election* as between remedies a shipper may not review an order of the Commission. If this is a correct interpretation of the District Court holding, it goes farther than the holding of the Supreme Court in the same case as we will hereinafter point out. But we believe the District Court intended no such thing because, although not expressed in the opinion of the District Court, it seems obvious that the District Court had in mind the additional fact of the remedy invoked and the relief sought which was an important element in the opinion of the Supreme Court.

On appeal to the Supreme Court the decision of the lower court was affirmed.

In the first part of its opinion, the court applied the so-called "negative order" doctrine originally adopted in *Proctor & Gamble Company vs. United States,* 225 U. S. 282, but since repudiated in *Rochester Telephone Company vs. United States,* 307 U. S. 125. The court then pointed out that "there being nothing to suggest that the Commission acted arbitrarily or without evidence to support its conclusion or that it transcended its statutory powers" the order was not susceptible to review by the courts. Finally the court came to that portion of its opinion relied on by defendants and by the lower court in this case, a portion of which reads as follows:

> "But putting the foregoing grounds entirely aside, and assuming the correctness of appellant's contentions to the contrary, nevertheless, having regard to the remedy invoked, and the relief sought by the petition, we think the district court was without jurisdiction. Section 9 of the Interstate Commerce Act, Chap. 104, February 4, 24 Stat. at L. 379, 382

(U.S.C. Title 49, §9), provides that a claim for damages against a common carrier may be brought before the Commission by complaint, or by an action in a Federal district court of competent jurisdiction, but that the claimant or claimants 'shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt.' Having elected to proceed and having proceeded to a determination before the Commission, appellant was, by force of this provision, precluded from seeking reparation upon the same claims by the alternative method of procedure. Compare *Geo. A. Hormel & Co. vs. Chicago, M. & St. P. R. Co.* (C.C.A. 8th) 283 Fed. 915, 918."

We call attention to the fact that while the language just quoted seems very similar to that used by the District Court in the same case, there is one important element mentioned by the Supreme Court that was not referred to in this part of the opinion of the District Court and that is the words: "having regard to the remedy invoked and the relief sought by the petition."

The remedy invoked was the Urgent Deficiencies Act but the relief asked, in addition to asking that the Commission's order be vacated, was the entry of a decree "granting the prayer of said complaints (filed with the Commission), and finding that petitioner has been overcharged by an amount which is equal to the difference between the rates assessed by said defendant carriers and the rates lawfully applicable to said petitioner's shipments, and ordering a further hearing, if necessary, for the purpose of determining the amount of money to be paid by the defendant carriers to petitioner by way of reparation."

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This is a far cry from the review permitted under the Urgent Deficiencies Act. It was not merely a request that the court find that the Commission exceeded its authority and that for such reason the order be vacated. It was an attempt to have the court determine plaintiff's right to reparation rather than to review the Commission's action to the very limited extent permitted by the Urgent Deficiencies Act and, again, like the holding of the District Court, it was predicated on plaintiff's contention that the matter was not one within the primary jurisdiction of the Commission but was one within the original jurisdiction of the court.

As the court pointed out, in view of the relief asked and the grounds asserted for the vacation of the Commission's order, in substance and in principle the claim before the Commission and the claim before the court were the same and the District Court was without authority to entertain the controversy. In *Standard Oil Company vs. United States,* plaintiff had attacked the order of the Commission on grounds far exceeding those permitted in a suit under the Urgent Deficiencies Act and had asked for relief which the court in a suit under the Urgent Deficiencies Act was powerless to grant.

In *Alton Railroad Company vs. United States,* 287 U. S. 229 (237-240), this court held that a suit to set aside an order of the Interstate Commerce Commission is not the equivalent of a decision by the court on the merits of the controversy before the Commission. "The court is not called upon here * * * to afford relief which the Commission, in the exercise of its power, had found that the complainant was not entitled to receive * * *. The court is asked to find that the Commission denied the Alton a con-

stitutional right as a result of acting upon erroneous principles of law, and therefore, to enjoin that part of the order." This is the distinction the court had in mind in the Standard Oil Company case when it said that "having regard to the remedy invoked and the relief sought," the District Court was without jurisdiction and when it held, in the Standard Oil Company case, that the case before the court and the case before the Commission were the same in substance.

Thus construed, we have no quarrel with Standard Oil Company vs. United States, but thus construed it does not support the opinion of the lower court in this case. In this case the District Court was not asked either (a) to reach its own conclusions as to the facts, or (b) to determine the right of the plaintiff against the carriers, or (c) to enter a judgment or decree for the amount alleged to be owing plaintiff, or (d) to compel the Commission to award damages to the plaintiff. All that was asked of the court was that it determine that the *Interstate Commerce Commission* had acted in an unlawful manner and exceeded its authority by acting without adequate evidence and arbitrarily and by the application of erroneous principles of law, and that the court for such reasons vacate the decision of the Commission and remand it to the Commission for further action. This would not be the recovery of damages in the District Court. It would not be a plenary suit of the nature which Standard Oil Company attempted to make of its case. This case is both, in the grounds upon which relief is urged and the relief sought, strictly limited to grounds cognizable and relief which may be granted in suits under the Urgent Deficiencies Act (*Alton R. R. vs. U. S.*, 287 U. S. 229), and in this respect it differs radically from *Standard Oil Company vs. United States.*

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OTHER CASES RELIED ON BY THE DISTRICT COURT

The District Court, in its opinion, took the position that its interpretation of *Standard Oil Company vs. United States* was upheld by two later cases in this court, *Ashland Coal and Ice Company vs. United States,* 325 U. S. 840, and *George Allison and Company vs. United States,* 296 U. S. 546. Both of these were memorandum opinions affirming without explanation, other than the citation of authorities, decisions of the District Court.

In the Ashland Coal Company case the plaintiff had filed a petition for review of an order of the Interstate Commerce Commission holding a rate unreasonable for the future but denying reparation for the past. The District Court dismissed the case for lack of jurisdiction and also decided the case against plaintiff on the merits. In the Allison case plaintiff had filed a petition to review an order of the Interstate Commerce Commission making an award which plaintiff claimed was inadequate and the District Court dismissed the case for lack of jurisdiction.

The Ashland case was the last of these cases decided by this court and in its opinion in this case the District Court said:

> "It (the Ashland case) expressly reiterated and reaffirmed the doctrine that where a shipper sues a carrier before the Commission for reparations, this constitutes an election under Section 9 of the Interstate Commerce Act, which precludes recourse to a District Court either by original action or by appeal from the Commission decision."

Before taking up the opinions of the District Courts in these two cases, we think it important to call to the court's attention the authorities cited by the court in its memorandum opinions. In the Ashland case the citations read as follows: "*Standard Oil Company vs. U. S.*, 283 U. S. 235, 240-241; *George Allison and Company vs. U. S.*, 296 U. S. 546." The Allison case cited authorities as follows: "*Standard Oil Company vs. United States*, 283 U. S. 235, 241; *Brady vs. United States*, 283 U. S. 804." Brady vs. United States was also a memorandum opinion of this court affirming a decree of the District Court dismissing a complaint filed to review an award made by the Interstate Commerce Commission but which plaintiff claimed was inadequate. In its memorandum opinion this court cited the following authorities in support of its action:

Standard Oil Company vs. U. S., 283 U. S. 235;

United States vs. L. & N. Railroad,
235 U. S. 314, 320;

I. C. C. vs. D. L. & W. Railroad Co.,
220 U. S. 235, 251;

I. C. C. vs. Ill. Central Railroad, 215 U. S. 452;

B. & O. Railroad Co. vs. U. S., 215 U. S. 481, 494.

An examination of the opinions of this court in each of the cases cited in the Brady case shows that they have one thing in common. Each of these cases held that under the Urgent Deficiencies Act the court may not, in reviewing an order of the Interstate Commerce Commission, substitute its judgment for that of the Commission but may consider only whether or not the Commission exceeded its constitutional or statutory authority or acted without substantial evidence or arbitrarily. And in the D. L. & W.

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case, the Illinois Central case and the B. & O. case, such holding appears at the specific pages of the court's opinion cited in the opinion in the Brady case.

The Brady case was also a suit to review an order of the Interstate Commerce Commission making an award which plaintiff claimed was inadequate, but the question of an election of remedies under Section 9 of the Interstate Commerce Act was not mentioned in the opinion of the District Court. We direct the court's attention to the fact that this court's citation of the Standard Oil Company case in the memorandum opinion in the Brady case did not refer to any particular page of the Standard Oil Company opinion. The District Court, in its opinion in this case, pointed out that the reference to the Standard Oil Company case in the memorandum opinion in the Ashland case referred to pages 240-241 of the opinion and in the Allison case to page 241 of the opinion in the Standard Oil Company case. And this was construed by the District Court to mean that this court had approved the theory adopted by the District Court in this case that any suit to review an order denying reparation is an attempt to exercise both of the alternative remedies provided by Section 9 of the Act and is therefore barred.

In order to determine the correctness of this theory of the District Court it will be necessary to examine the opinions of the lower courts in each of these cases. In doing so, however, it must be borne in mind that we have no information as to the basis of the decisions of this court except the cases cited in the memorandum opinions and the fact that this court agreed with the result reached by the lower courts. This, however, does not imply that this court agreed with the reasoning adopted by the lower

courts since this court will affirm the judgment of a lower court if the right result has been reached by the lower court even though the wrong reason is given. *Securities and Exchange Commission vs. Chenery Corporation,* 318 U. S. 80, 88; *Helvering vs. Gowran,* 302 U. S. 238, 245 and cases cited.

Taking up first the opinion of the District Court in the Brady case, 43 Fed. (2) 847, liberal quotations from which appear in the opinion of the District Court in *Ashland vs. United States,* we find that this also was a suit attacking an award made by the Interstate Commerce Commission which was claimed to be inadequate. The District Court went at length into the provisions of the Interstate Commerce Act other than Sec. 9 and held that because of them an intent on the part of Congress was shown that no review of an order denying reparation would be permitted and in doing so relied on *Proctor and Gamble vs. United States,* 225 U. S. 282, now overruled. An examination of the opinion of the District Court in the Brady case and an examination of the memorandum opinion of the Supreme Court in the same case will show conclusively, that while this court may have agreed with the result reached by the District Court, this court certainly did not agree with the reasoning or authorities in the District Court's opinion. The opinion of this court in the Brady case cites five cases which we have earlier listed. The opinion of the District Court is liberally sprinkled with citations of authority.

However, we direct the court's attention to the fact that not one of the opinions cited by this court in its opinion in the Brady case appeared in the opinion of the District Court in that case and not one opinion cited by the District Court in its opinion was included in the list of authorities

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cited by this court. The opinion of the District Court in the Brady case as authority for any proposition is further weakened by one further factor. The District Court, on page 852, held that while a suit under the Urgent Deficiencies Act might not be brought to review an order granting an award claimed to be inadequate, suit might be brought at law on the award in the District Court and that the plaintiff in such case would be at liberty to challenge the correctness of the amount of the award and attempt to establish damages in a greater amount.

Following the decision of this court in the Brady case, plaintiff did exactly what the district judge suggested. Suit at law was brought on the same award in the District Court of West Virginia and plaintiff recovered a judgment approximately five times the amount of the Commission's award. This court held that "having elected to seek relief through the Commission, plaintiff is not entitled to recover more than the amount of the award." *Baltimore & Ohio R. R. Co. vs. Brady,* 288 U. S. 448.

Taking up next the opinion in the Allison case (12 Fed. Supp 862), we find that the Commission had awarded damages to the plaintiff which the plaintiff considered inadequate. The opinion of the District Court held that there was no substantial difference between review of such an order and review of an order denying an award entirely. The court dismissed the bill for lack of jurisdiction but the opinion makes it quite plain that this was done because of the negative order theory adopted in *Proctor & Gamble Co. vs. United States,* 225 U. S. 282, and in *Standard Oil Co. vs. United States,* 283 U. S. 235. It is true that the District Court in its opinion referred to page 241 of the opinion in the Standard Oil Company case and the same reference

was made in the memorandum opinion of this court. But an examination of the opinion in the District Court shows that this was merely in support of the proposition that if the court does not have jurisdiction to entertain the complaint the mere fact that damages are not asked in the District Court but the court is asked instead to set aside the order of the Commission is not sufficient to confer jurisdiction on the court. The decision of the lower court that it had no jurisdiction was based squarely on the now discredited negative order doctrine.

Taking up now the opinion of the District Court in the Ashland Coal Company case which is reported in 61 Fed. Supp. 708, we find that plaintiff had filed a complaint before the Interstate Commerce Commission attacking certain rates as unreasonable and asking that the Commission order a reduction in such rates and make an award of damages to the plaintiff for the amount paid by it in the past in excess of such amount as the Commission might find was reasonable. The Commission held the rates unreasonable as to future shipments and ordered them reduced but held that the rates were not unreasonable as to past shipments and therefore denied an award. The District Court held it was without jurisdiction because the maintenance of such a suit would be an attempt to exercise both of the remedies provided for in Section 9 of the Interstate Commerce Act. (Incidentally, this opinion of the District Court is the only opinion we have seen that holds without any qualification that because of the election of remedies provision of Section 9 of the Interstate Commerce Act, the court may not under the Urgent Deficiencies Act review an order of the Commission denying reparation.)

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In support of its holding that the court had no jurisdiction, the District Court relied on four cases: *Standard Oil Company vs. United States,* 283 U. S. 235; *Atlantic Lumber Corporation vs. Southern Pacific Company,* 47 Fed. Supp. 511; and the opinions of the District Courts in the Brady case and the Allison case. The court quoted that portion of the opinion in the Standard Oil Company case which commences on page 240 of the opinion of this court under the heading "Third" and held that this portion of the Standard Oil Company opinion determined that a suit to review an order of the Commission dismissing a claim for reparation was barred by the election of remedies provision in Section 9 of the Interstate Commerce Act. It also held that on this point "the Standard Oil case was not impaired by the Rochester Telephone case."

The court next relied on the opinion of the District Court in *Atlantic Lumber Corporation vs. Southern Pacific Company.* Digressing for a moment to consider the opinion of the District Court in the Atlantic Lumber Corporation case, which was not appealed to this court, we find that the Commission had denied plaintiff's claim for reparation in the amount of $688.10. Suit was thereupon filed in the District Court.

Two causes of action were set forth in the complaint in the District Court. The first cause of action was plainly a suit at law to recover $688.10. This cause of action was not passed on in this particular opinion. The second cause of action "re-alleges by adoption all of the allegations of the first cause," set forth the proceeding before the Commission, claimed that the Commission's order was not supported by substantial evidence, was arbitrary and contained a mistake of law. The prayer under the second

cause of action was "that the court annul, and set aside the Commission's order and require all of the defendants to pay to plaintiff the sum of $688.10." A three-judge District Court was called to pass on the plaintiff's claim under the second cause of action and held that under Standard Oil Company vs. United States the suit might not be maintained.

While the opinion of the District Court might appear to support the general theory that a suit under the Urgent Deficiencies Act may not be maintained to review an order failing to allow reparations, in view of the prayer of the complaint, both the first and the second causes of action were undoubtedly an attempt to exercise both of the alternative remedies given in Section 9 of the Interstate Commerce Act. Notwithstanding this, the District Court did decide the second cause of action on its merits, stating, "The question of the proper rate and demurrage was correctly determined by the Commission." (Page 513.)

Reverting to the opinion of the District Court in the Ashland case, we find that the next opinion relied on by the District Court was the opinion of the District Court in the Brady case, 43 Fed. (2d) 847. The portion of the opinion from the Brady case quoted in the Ashland opinion held that a suit might not be maintained to review an order of the Commission denying reparation, not because of any election of remedies theory but because, since in the Interstate Commerce Act provisions appeared for reviewing other orders of the Commission, it appeared to be the intention of Congress that orders denying claims for reparations should not be reviewed. We have already discussed the Brady case.

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The final case relied on in the Ashland case in support of its holding that the court was without jurisdiction is *Allison Corporation vs. United States,* where the court referred to the fact that if it did not have jurisdiction, jurisdiction could not be conferred merely by failure to ask the District Court to award damages, citing in support of this, *Standard Oil Company vs. United States.* In the Ashland case, however, the court then went on to decide the case on its merits and from this portion of the opinion it appears that the evidence presented to the Commission was not before the court. The court quoted from *Mississippi Valley Barge Company vs. United States,* 292 U. S. 282, to the effect that the findings of the Commission may not be assailed upon appeal in the absence of the evidence on which they were made.

Plaintiff's claim in the Ashland case was that the court could not, on the same mass of evidence, find a rate unreasonable as to the future and not as to the past. But the court pointed out "that the findings of the Commission (though not as clear and complete as the importance of the instant case would justify) do afford ample support and a rational basis for the Commission's decision." (Page 713.)

In view of all of this we do not think it can be said that when this court, by memorandum opinion, affirmed the judgment of the lower court in the Ashland Coal Company case it placed its stamp of approval on the interpretation placed by the District Court in the opinion in that case on the opinion in the Standard Oil Company case. And this is true in spite of the fact that this court, in its memorandum opinion, referred to pages 240 and 241 in the opinion in the Standard Oil Company case because,

on page 240 of the Standard Oil Company case, the court pointed out that to attack an order of the Commission it must be shown that the Commission acted without evidence to support its conclusions and in that portion of its opinion which begins on page 240 and continues on 241, in which the court discussed the election of remedies theory, the court held that to attack a decision of the Commission (apart from the theory that it exceeded its jurisdiction) it must be shown that there is something more to the case than a mere attempt to retry in the District Court the questions already presented before the Commission, that the proceeding in the District Court must not be merely an attempt to assert before the court the same cause of action passed on by the Commission. The memorandum opinion of this court in the Ashland case in citing *Standard Oil Company vs. United States* and the Allison case is nothing more than a continuation of the entire line of cases going back to *Interstate Commerce Commission vs. Illinois Central Railroad,* 215 U. S. 452, and the other cases cited in *Brady vs. United States,* which held that the court may not substitute its judgment for that of the Commission.

Summarizing all of these cases and putting together the opinions of this court and of the District Courts in each of them, we find that down to and including the decision of this court in the Allison case, the suits to annul the orders of the Interstate Commerce Commission were dismissed for want of jurisdiction either because of the negative order doctrine or because of the limitations on the grounds on which an order of the Commission may be reviewed, or both. In none of the decisions did the court pass on the election of remedies theory.

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The only additional feature of these cases worth mentioning is that in the Allison case the court pointed out, in reliance on page 241 of the opinion in the Standard Oil Company case, that the mere fact that plaintiff asked that the order of the Commission be vacated and did not ask the court to award damages, is not sufficient to confer jurisdiction on the court if jurisdiction does not substantively exist. We think the decision of this court in the Ashland Coal Company case was not intended to go any farther than the other cases. These very points appear on pages 240 and 241 of the opinion of this court in the Standard Oil Company case, reference to which was made in the memorandum opinion of this court in the Ashland Coal Company case.

Reverting to the proposition that this court will affirm a decision of the lower court if the right result is reached regardless of the reasons given by the lower court and bearing in mind the variety of questions decided by the lower court in the Ashland case, several of which were reflections of matters appearing on pages 240 and 241 of the opinion of this court in the Standard Oil Company case, it does not appear to us that it can be said that by its memorandum in the Ashland Coal Company case this court placed on the opinion in the Standard Oil Company case the construction that an order of the Commission denying reparation may not be reviewed under the well-known limitations on review of an order of an administrative body because to do so would be an exercise of both of the alternative remedies provided for by Section 9 of the Interstate Commerce Act.

OTHER AUTHORITIES ON RIGHT TO REVIEW

During the period covered by the cases to which we have just referred, an important change took place in the attitude of this court toward reviewing certain orders of the Interstate Commerce Commission. In 1910, the Commerce Court Act was passed (36 Stat. 539). By that Act, Congress created the Commerce Court and transferred to it the jurisdiction then possessed by the Circuit Courts of the United States over all cases to enjoin, set aside, annul or suspend in whole or in part any order of the Interstate Commerce Commission.

The first case which came before the Commerce Court was *Proctor and Gamble vs. United States,* 188 Fed. 221. Proctor and Gamble Co., being dissatisfied with having been compelled to pay demurrage under certain rules of the railroads involved, filed a petition with the Interstate Commerce Commission charging that such rules were in violation of the Interstate Commerce Act, asking that the rules be held unlawful and that the railroads be required to refund to Proctor and Gamble Company demurrage which had been unlawfully exacted from it under the rules. The Commission, after hearing on the merits, dismissed the complaint. Suit was thereupon filed in the Commerce Court to set aside the order of the Commission. The jurisdiction of the Commerce Court was challenged unsuccessfully by the defendants but the Commerce Court denied Proctor and Gamble relief on the merits. An appeal was then taken to this court, the opinion being reported in 225 U. S. 282.

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This court, in a lengthy opinion, held that since the order of the Interstate Commerce Commission did not command anyone to do anything, or to refrain from doing anything, but merely determined that plaintiff was not entitled to any change in the existing situation, there was nothing on which the power of the Commerce Court could act and that the Commerce Court therefore had no jurisdiction to hear the suit filed with it. This was the beginning of the so-called "negative order" doctrine. As a result of this doctrine it was impossible to review under the Commerce Court Act, and later under the Urgent Deficiencies Act, an order of the Commission denying reparation. This was the first ground on which this court upheld dismissal of the suit in the Standard Oil Company case.

While the negative order doctrine did not go unchallenged, it was not until the decision of this court in *Rochester Telephone Corporation vs. United States,* 307 U. S. 125, decided in 1939, that the court finally reached the conclusion that an order dismissing a complaint on the merits was as much a determination of rights and could be as much of an illegal act on the part of the Commission as an order granting relief and that an order dismissing a petition for relief on the merits could and in many instances did present a justiciable question which, under the jurisdiction conferred by the constitution, might be decided by the courts.

The Rochester Telephone case did not arise under the Interstate Commerce Act. It grew out of an order of the Federal Communications Commission which determined that Rochester Telephone Corporation was subject to certain orders of the Commission. Suit to review the order of the Communications Commission was filed under the

Urgent Deficiencies Act as extended to orders of the Federal Communications Commission by the Federal Communications Act. No challenge to the jurisdiction of the District Court was made in the lower court which denied relief on the merits. In this court, however, the Government challenged the jurisdiction of the District Court under the negative order doctrine. This court, in an extensive opinion written by Mr. Justice Frankfurter, re-examined the entire question. The opinion pointed out that the term "negative order" was used to cover three different types of orders. They were:

1. Where the action sought to be reviewed might have the effect of forbidding or compelling conduct on the part of the person seeking to review it, but only if some further action should be taken by the Commission. An example given was an attempt to review a valuation made by the Commission which would have no immediate legal effect.

2. Where the action sought to be reviewed declined to relieve the complainant from a statutory command forbidding or compelling conduct on his part. An example given was the denial of permission by the Interstate Commerce Commission for a departure from the long-short haul clause.

3. Where the action sought to be reviewed did not forbid or compel conduct on the part of the plaintiff but was attacked because it did not forbid or compel conduct by a third person. One example given was that of a shipper requesting the Interstate Commerce Commission for an order compelling a carrier to adopt certain rates or practices.

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The court said that cases falling in the first class were not subject to review. This was not because the order did not forbid or compel conduct on the part of any person but because of an absence of the traditional criteria for bringing judicial action into play. Part of these were found in the granting of judicial power to determine "cases" and "controversies" in Article III of the Constitution. Partly they were because the orders were not final and the Federal Courts had always "been loath to authorize review of interim steps in a proceeding."

Those cases falling in Class 2 and Class 3, however, were held to be subject to review because they presented "cases" or "controversies" under the Constitution. The conventional requisites of equity jurisdiction were present and the Urgent Deficiencies Act granted to the District Courts jurisdiction in suits challenging *any* order of the Commission.

In discussing cases in Class 3, the court considered as typical the situation in *Proctor and Gamble vs. United States.* The court pointed out that Proctor and Gamble Company had the right to institute the proceeding before the Commission; that, since it asserted a legal right to have the Commission apply different principles of law from those which led the Commission to dismiss the complaint, the ingredients for an adjudication constituting a "case" or "controversy" were present, and that judicial relief would be precisely the same as though the Commission had acted. If the principles on which the Commission acted were not erroneous, the suit would be dismissed. "If the Commission was found to have proceeded on erroneous legal principles, the Commission would be ordered to proceed within the framework of its own dis-

cretionary authority on the indicated correct principles." The requisites of equity were satisfied because the bill sought to avoid a multiplicity of suits. Finally, the shipper was within the express language of the statute authorizing suits to enjoin, set aside or annul orders of the Interstate Commerce Commission.

The court then considered the limitations on the right to review orders of an administrative body. It referred to the primary jurisdiction doctrine which required that matters calling for technical knowledge pertaining to transportation be first passed on by the Interstate Commerce Commission. It also referred to the doctrine of administrative finality by which an order of the Commission is subject to attack only if beyond the constitutional or statutory power of the Commission or if arbitrary or made without substantial supporting evidence. It concluded with a determination that any distinction as such between "negative" and "affirmative" orders as a touchstone of jurisdiction to review the Commission's order serves no useful purpose "and insofar as earlier decisions have been controlled by this distinction they can no longer be guiding."

But by this decision a large number of prior decisions lose all or much of their force. In the discussion of *Standard Oil Company vs. U. S.*, much is made of the fact that the opinion in the Rochester Telephone case did not, in so many words, overrule that decision. That decision was mentioned in a note to the opinion which said "*Standard Oil Company vs. United States,* 283 U. S. 235, held not reviewable the action of the Commission refusing to grant reparations but the main basis of the decision was not the negative order doctrine but the statutory scheme dealing with reparations." This was by no means an expression of approval of the Standard Oil Company case.

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Certainly to the extent that *Standard Oil Company vs. United States* was based on the negative order doctrine that case was overruled by the Rochester Telephone case. The note in the Rochester Telephone case, rather than being an approval of the remainder of the decision in the Standard Oil Company case, merely pointed out that right to review in the Standard Oil Company case was also determined to depend on the construction of Section 9 of the Interstate Commerce Act and that, since neither Section 9 of the Interstate Commerce Act nor any other statute having a similar effect was before the court in the Rochester Telephone case, the court could neither approve nor disapprove any part of the Standard Oil case except that portion dealing with the negative order theory.

Every one of the cases relied on by the District Court in support of its opinion in this case, except the Ashland Coal Company case, was decided prior to the Rochester Telephone case. Every one of them, therefore, must be considered as having been modified by the decision of the court in the Rochester Telephone case and to the extent that they seem to support the decisions of the District Court this must be borne in mind.

Rochester Telephone Corporation vs. United States was followed by this court in *Federal Power Commission vs. Pacific Power and Light Company,* 307 U. S. 156; *Mitchell vs. United States,* 313 U. S. 80; *Columbia Broadcasting System, Inc., vs. U. S.,* 316 U. S. 407; *Interstate Commerce Commission vs. Hoboken Manufacturers Railroad Company,* 320 U. S. 368, and *Eldorado Oil Works vs. United States,* 328 U. S. 12.

The Eldorado Oil Works case is particularly illustrative of the view now held by this court on the reviewability of

orders of the Interstate Commerce Commission. In the Eldorado Oil case a lessee of tank cars had brought suit in the District Court against his lessor to recover a portion of the rental received by the lessor from the railroads. On review by this court of a judgment of the lower court, this court determined that the question involved was one on which the Commission should first pass. The matter was thereupon remanded to the District Court with instructions that it should be held there to give plaintiff an opportunity to seek a determination by the Interstate Commerce Commission on the question of whether or not plaintiff was entitled to recover the money under its contract. Plaintiff thereupon filed a petition with the Commission and after a hearing the Commission dismissed the complaint on the merits. Petition for review of this decision under the Urgent Deficiencies Act was filed and the lower court dismissed the case for lack of jurisdiction. On appeal from such dismissal this court said (328 U. S. 12 (18-19)):

> "Before we reach the merits of the controversy we must at the outset briefly dispose of the jurisdictional question. As the facts already stated reveal, the Commission's findings and determination, if upheld, constitute far more than an 'abstract declaration.' 'Legal consequences' would follow which would finally fix a 'right or obligation' on appellants' part. These findings are more than a mere 'stage in an incomplete process of administrative adjudication,' for the Commission here has discontinued further proceedings. We, therefore, think that the Commission's action falls within the class of 'orders' which *Rochester Teleph. Corp. vs. United States,* 307 U. S. 125, 83 L. Ed. 1147, 59 S. Ct. 754, held to be reviewable by a district court of three judges. The district court erred in dismissing the complaint for want of jurisdiction."

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It is not possible to reconcile the theory of the Rochester Telephone case and the other cases which followed it, including the Eldorado Oil Works case, with the theory which the lower court in this case said was adopted in the Standard Oil Company case. In both the Standard Oil Company case and in this case (and also in the Proctor and Gamble case), the order of the Commission denying reparations was far more than an abstract declaration. Legal consequences did follow which, if the judgment is to stand, did fix a right or obligation. The order of the Commission in each case definitely determined that the complainant before the Commission was not entitled to the recovery sought. It was a final adjudication which would cut off complainant's rights. It certainly presented a justiciable question on which the court had not only the power but the obligation to act if requested.

If *Standard Oil Company vs. United States* was correctly construed by the District Court and if the other cases relied on by the District Court were intended to place the stamp of approval on such interpretation, all of such cases have now been overruled and may no longer be regarded as authority in view of the decision of this court in the Rochester Telephone case and Eldorado Oil Works case and the other cases which have repudiated the negative order doctrine.

If Standard Oil Company vs. United States Held Suit Under the Urgent Deficiencies Act Barred by Section 9 of Interstate Commerce Act, Standard Oil Company vs. United States Should Be Overruled.

As we have hereinbefore pointed out, we do not agree with the construction placed by defendants and by the lower court on *Standard Oil Company vs. United States*, 283 U. S. 235. However, if the lower court is correct in its interpretation of the Standard Oil Company case, then it is respectfully insisted that the court should now overrule that case. A suit under the Urgent Deficiencies Act to review an order of the Interstate Commerce Commission dismissing a complaint filed under Section 9 of the Interstate Commerce Act is not barred by the provisions of Section 9 and if Standard Oil Company vs. United States so held, it should be overruled for three reasons:

1. Section 9 of the Interstate Commerce Act is not susceptible of such a construction.

2. If Section 9 of the Interstate Commerce Act is susceptible of such a construction, such a construction does violence to the plain intent of Congress in adopting the Interstate Commerce Act.

3. If Section 9 of the Interstate Commerce Act is susceptible of such a construction, the court should not adopt such a construction unless no other construction is possible because such a construction will render Section 9 unconstitutional. We shall discuss these in the order set forth above.

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1. Section 9 of the Interstate Commerce Act is not susceptible of such a construction.

So far as material here, Section 9 of the Interstate Commerce Act reads as follows:

> "Any person or persons claiming to be damaged by any common carrier * * * may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter in any District Court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two remedies of procedure herein provided for he or they will adopt." 49 U.S.C.A. Sec. 9.

The decision of this question turns on whether or not this suit is a "suit for the recovery of damages for which such common carrier may be liable" because, unless this suit is such a suit, it is not an attempt to exercise the other of the "two remedies of procedure" provided for in the section.

This is not a suit to recover damages against the carriers. In the first place, the carriers were not original parties to the suit. They were not necessary parties to the suit. They will not be directly affected by the outcome in the sense that the court in this suit can order them to do or refrain from doing any act. Because of the provisions of the statute (28 U.S.C.A. 46), the suit is brought against the United States as the only named defendant. Actually the suit is against the Interstate Commerce Com-

mission. It complains only against acts of the *Commission* which are claimed to be unlawful. It asks for no damages. It does not ask for any relief against the carriers. The sole relief sought is that the alleged unlawful action of the *Commission* be vacated and that the Commission be required to proceed legally to a determination of plaintiff's complaint.

But if plaintiff is successful, not only in this suit but ultimately in its proceeding before the Commission against the carriers, the order awarding payment and the determination of the facts on which such award is based will be the order and determination of the Commission and not of the court.

Plaintiff recognizes that the power of ultimate determination rests with the Commission and not with the court. Plaintiff is merely insisting in this case that the Commission proceed legally; that it base its decision solely on competent evidence and that it not act arbitrarily.

Section 9 of the Interstate Commerce Act makes no mention of a suit against the Commission to compel it to act in a legal manner. It does prohibit the maintenance of a "suit for damages" after a plaintiff has been unsuccessful before the Commission. A suit under the Urgent Deficiencies Act to review an order of the Commission is a step in furtherance of the proceeding before the Commission, not an attempt to pursue an alternative remedy. It is an insistence by the plaintiff on the right given it by Section 9 of the Interstate Commerce Act that the Commission proceed to hear and determine plaintiff's complaint before the Commission but in a legal and constitutional manner. (*Alton R. R. vs. U. S.*, 287 U. S. 229.)

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We respectfully assert that Section 9 of the Interstate Commerce Act may not be so construed as to bar the right to maintain an action under the Urgent Deficiencies Act to review an order of the Commission denying reparation.

2. If Section 9 of the Interstate Commerce Act is susceptible of such a construction, such a construction does violence to the plain intent of Congress in adopting the Interstate Commerce Act.

If we assume that the words "suit for damages" is sufficiently elastic to permit the court to hold that it includes a suit under the Urgent Deficiencies Act, is such a construction in accordance with the Congressional intent in enacting the statute? The ordinary meaning of the words "suit for damages" is an action at law against the person alleged to be liable to the plaintiff to obtain a judgment for money, enforceable by process. In construing a statute, the ordinary meaning of ordinary words should be used unless to do so is plainly or necessarily contrary to the obvious intent of the legislative body. In the enactment of the Interstate Commerce Act, Congress certainly did not intend to deprive the courts of all rights to pass on judicial questions even in connection with claims for reparation.

In Section 9 of the Act, Congress permitted a plaintiff at his election to bring suit in the Federal Court for the recovery of the damages for which a carrier might be liable under the provisions of the Act. And provisions similar to those now contained in Section 16(2) of the Act have been included in the Act from the time of its adoption

in 1887. This does not indicate that Congress intended to deprive a court of any participation in determining the rights of one who has been damaged by unlawful acts of a carrier.

The first statute passed by Congress that made specific reference to the power of a court to set aside an order of the Interstate Commerce Commission was the Act creating the Commerce Court adopted in 1910 (36 Stat. 539), which conferred on the Commerce Court certain jurisdiction over "cases brought to enjoin, set aside, annul or suspend in whole or in part *any* order of the Interstate Commerce Commission." By the Urgent Deficiencies Act of 1915, this jurisdiction was transferred to the District Courts. But the jurisdiction granted to the Commerce Court in 1910 was not the origin of suits to review orders of the Interstate Commerce Commission.

Prior to the enactment of the Commerce Court Act, suits to set aside orders of the Interstate Commerce Commission were brought in the Circuit Court of the United States and the jurisdiction conferred on the Commerce Court under the Act of 1910 was the jurisdiction "possessed by Circuit Courts of the United States and the judges thereof immediately prior to" June 18, 1910, in four specified classes of cases, one of which was to set aside an order of the Interstate Commerce Commission. The jurisdiction to hear such suits was conferred on the Circuit Court by an Act of March 3, 1875 (18 Stat. 470), conferring on the court jurisdiction to hear suits of a civil nature arising under the Constitution or laws of the United States. While this section was amended several times before the jurisdiction of the Circuit Court in such cases was transferred to the Commerce Court in 1910, none of

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the amendments had any substantial effect on the jurisdiction of the Circuit Court to hear cases of this nature. And this section, under which the Circuit Courts acted for over twenty years, and which formed the only basis for their jurisdiction in such cases, was in effect some thirteen years prior to the enactment of Section 9 of the Interstate Commerce Act.

In the face of all of this the court should not say that Congress intended to prohibit judicial review of an order of the Commission unless no other interpretation is possible. Had Congress intended that the action of the Interstate Commerce Commission should be final or that judicial review of its action should be prohibited, it would have been very simple to have so provided in Section 9 of the Act. "We cannot but think that if Congress had intended to make such a drastic departure from the traditions of equity practice, an unequivocal statement of its purpose would have been made." *Hecht Co. vs. Chester Bowles,* 321 U. S. 321-331 (329). "With this recognition by Congress of the applicability of judicial review in this field, it is not to be lightly assumed that the silence of the Statute bars from the courts an otherwise justiciable issue" (citing cases). *Stark vs. Wickard,* 321 U. S. 228 (309).

See also: *Intermountain Rate Cases,* 234 U. S. 476 (490-491).

No such language appears in the section. On the contrary, Congress was careful to specify that a plaintiff might not proceed both before the Commission and by "suit for damages" in the court. Had Congress intended to make the decision of the Commission final and free from examination by any court it would, to use the language of

Interstate Commerce Commission vs. Louisville and Nashville Railroad Company, 227 U. S. 88, have conferred on the Commission "a power possessed by no other official, administrative body or tribunal under our government."

To place an administrative body beyond the pale of judicial action may not in some instances be beyond the power of Congress; but to permit an administrative body to exercise judicial power free entirely from any examination by a court of the legality of the action of the administrative body, is so foreign to our concept of government of laws that it should not be lightly presumed that Congress had any such intention and an act of Congress should not be construed as doing so unless such an intention plainly appears from the Act.

To attempt to justify the action of the lower court in dismissing the complaint filed in this case because the plaintiff had, under Section 9, a right of election to proceed, either before the Commission or in court, is to be entirely unrealistic. In this connection the following should be borne in mind:

(a) The complaint filed by plaintiff before the Interstate Commerce Commission not only asked for an award of damages, but asked that the Commission order the defendant railroads to cease and desist from making unlawful charges in the future. This latter relief could be effectively granted only by the Commission and not by any court. At the time the complaint was filed with the Commission, plaintiff was still operating its plant at Mansfield and successive suits for damages would have been necessary.

(b) While the language of Section 9, standing by itself, would seem to permit the determination by a court of all

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claims for damages which a shipper might have against a carrier subject to the provisions of the Act, the decisions of this court on the so-called primary jurisdiction doctrine commencing with *Texas and Pacific Railway Company vs. Abilene Cotton Oil Company,* 204 U. S. 426, and continuing through *Robinson vs. The Baltimore and Ohio Railroad Company,* 222 U. S. 506; *Texas and Pacific Railroad Company vs. American Tie and Timber Company,* 234 U. S. 138; *Northern Pacific Railroad Company vs. Solum,* 247 U. S. 477; *Director General of Railroads vs. Viscose Company,* 254 U. S. 498; and *Great Northern Railroad Company vs. Merchants Elevator Company,* 259 U. S. 285, have taken away from the courts the right to hear in the first instance almost every conceivable type of case in which a shipper claims to have been damaged by a violation of the Act. A shipper can now proceed in court only in those rare cases where a question of law is involved and there is no question of fact, correct determination of which requires the exercise by the Commission of its expert knowledge and judgment. The difficulty which confronted plaintiff in this case is perhaps best illustrated by the two motions to affirm filed in this case. The motion of the intervening railroads to affirm the judgment of the District Court takes the position that the plaintiff in this case had an absolute right under Section 9 of the Interstate Commerce Act to bring suit for damages in court while the Interstate Commerce Commission as positively asserts that plaintiff had no election but that this case was one which the Commission alone had power to determine. The language used by the intervening railroads is as follows:

> "This is not the type of case in which the appellant was required to submit its claim to the Commission under the doctrine of primary jurisdiction.

> There was no question here as to the reasonableness of any rate or rule, no question as to discrimination or undue prejudice. There was, in short, no administrative question for determination."

On the contrary, the Interstate Commerce Commission, in its motion to affirm, says:

> "The question of the applicability of a rate under a transit tariff is an ultimate question of fact entrusted like many other questions to the expert judgment of the Commission."

In view of this inability of respondents to agree among themselves as to plaintiff's right to proceed in court, can it be said that plaintiff in fact had an election under Section 9 of the Interstate Commerce Act? It must be as obvious to the court as it is to plaintiff that plaintiff's only safe course was to proceed before the Commission, and, if this be so, the theoretical right of election was in fact non-existent.

(c) The argument was advanced in the lower court that this well accepted principle that the action of an administrative body may be tested in court is applicable only to a case where the administrative body acts in a purely administrative way rather than in the exercise of its quasi judicial capacity. And from this it was argued that review of an action of the Commission is permissible only where the public is involved and not when an individual citizen claims his rights have been violated. This is not only absurd but it is contrary to the principles laid down by this court in the many cases where the court upheld jurisdiction under the Urgent Deficiencies Act to review orders of the Commission and other administrative bodies which affected only a single individual. *Rochester Tele-*

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phone Corporation vs. United States, 307 U. S. 125; *Federal Power Commission vs. Pacific Power and Light Company,* 307 U. S. 156; *Eldorado Oil Works vs. United States,* 328 U. S. 12. In the Rochester Telephone case this court said that the same principles should have been applied in *Proctor and Gamble vs. United States,* 225 U. S. 282. The principle contended for in the lower court leads only to the ridiculous conclusion that, despite the fact that this court and the lower federal courts have repeatedly held that the judicial power of the United States is vested only in the courts and that no power except the judicial power can be conferred on the courts, the Commission would be supreme in judicial matters while the courts would be supreme in purely administrative or legislative matters. Congress certainly intended no such anomalous result from the Interstate Commerce Act or the acts providing for judicial review of administrative orders.

When these considerations are borne in mind the so-called election of remedies theory cannot be used as a bar to the plaintiff's right to review the order of the Commission in this case.

3. If Section 9 of the Interstate Commerce Act is susceptible of such a construction, the court should not adopt such a construction unless no other construction is possible because such a construction will render Section 9 unconstitutional.

The principle is well established that where an Act is susceptible of two constructions under one of which the Act would harmonize with the Constitution and under the other of which the Act would violate the Constitution, the court is required to adopt that construction which harmon-

izes with the Constitution. *Lockerty vs. Phillips*, 319 U. S. 182. Plaintiff asserts that to construe Section 9 of the Interstate Commerce Act as prohibiting judicial review of the order of the Interstate Commerce Commission is to adopt a construction which deprives a claimant of its property without due process of law contrary to the Fifth Amendment to the Constitution, and, if this be so, the court is then bound to adopt that construction of the section which will be free from this constitutional objection.

This court has not had many opportunities to say in so many words that the constitutional guarantee of due process of law requires judicial review of the action of an administrative body. This is because in most instances Congress has been careful to provide for judicial review to the extent that a court may determine whether or not the administrative body has acted arbitrarily or without substantial evidence or in excess of its authority. Hence, most of the decisions have been content to hold that the judicial review afforded by the particular statute questioned satisfies the constitutional requirement.

However, the plainest statement we have seen of the right to judicial review of a quasi judicial order of an administrative tribunal is in *State of Florida ex rel. Williams vs. Whitman*, 116 Fla. 196, 156 Southern 705, where the court said:

> "In so far as the legal weight and effect to be accorded administrative decisions of a quasi legislative or quasi executive character is concerned, the decisions are clear that the courts will not review them for mere errors of procedure or erroneous conclusions of fact, where the administrative agency in arriving at its decision violated no rule of law and the record as an entirety does not show an abuse of

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the delegated authority, or arbitrary or unreasonable action. *Tagg Bros. & Moorhead vs. United States,* 280 U. S. 420, 50 S. Ct. 220, 74 L. Ed. 524; *Florida Motor Lines, Inc., vs. Railroad Commission,* 101 Fla. 1018, 132 So. 851, 852.

"But regardless of the apparently conclusive force and effect that the courts have heretofore accorded to the findings and decisions of administrative agencies acting in a quasi legislative or quasi executive capacity, singly or in combination with each other, it is certain that the function and prerogative of deciding finally the law and the facts of an actual controversy bearing upon a vested legal right sought to be divested or impaired in a proceeding initiated under statute before an administrative tribunal is, in its last analysis, *a pure judicial power,* the exercise of which is *subject to review in courts* of competent jurisdiction having power to issue the writs and processes whereon legal review of official acts of other tribunals or bodies can be had.

"To the extent therefore that an administrative statutory tribunal or agency is vested with statutory power to make decisions having a judicial character or attribute, as distinguished from mere exercise of delegated legislative or executive functions under the law, resort may be had to the courts of the land for the purpose of review, whether any special method of appeal be provided or not, and in such cases the courts of general jurisdiction to whom complaint is addressed against an alleged improvident, erroneous, or unjustified administrative decision shown to divest or impair some vested legal right, unless abrogated or modified, will grant an aggrieved party relief against quasi judicial decisions of such administrative agencies, by means of those available common-law processes adapted and designed to be used by the courts to restrain excessive or unauthorized exercises of powers on the part of subordinate jurisdiction or quasi judicial tribunals."

While this is a decision of a state court, it announces exactly the rule adopted and followed by this court as shown by the following quotations:

> "To avoid misconstruction upon so grave a subject, we think it proper to state that we do not consider Congress can either withdraw *from judicial cognizance* any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power, a matter which, from its nature, is not a subject for judicial determination." *Den vs. The Hoboken Land and Improvement Co.*, 18 How. 272 (284), 15 L. Ed. 372 (377).

> "With this recognition by Congress of the applicability of judicial review in this field, it is not to be lightly assumed that the silence of the statute bars from the courts an otherwise justiciable issue, *United States vs. Griffin*, 303 U. S. 226, 238, 82 L. Ed. 764, 772, 58 S. Ct. 601; *Shields vs. Utah Idaho C. R. Co.*, 305 U. S. 177, 182, 83 L. Ed. 111, 115, 59 S. Ct. 160; cf. *American Federation of Labor vs. National Labor Relations Bd.*, 308 U. S. 401, 404, 412, 84 L. Ed. 347, 349, 353, 60 S. Ct. 300. The ruling in *Texas & P. R. Co. vs. Abilene Cotton Oil Co.*, 204 U. S. 426, 51 L. Ed. 553, 27 S. Ct. 350, 9 Ann. Cas. 1075, is not authority to the contrary. It was there held that the statute placed the power in the Interstate Commerce Commission to hear the complaint stated, not in the state court where it was brought. The Commission award was then to be enforced in court. P. 438. Here, there is no forum, other than the ordinary courts, to hear this complaint. When, as we have previously concluded in this opinion, definite personal rights are created by federal statute, similar in kind to those customarily treated in courts of law, the silence of Congress as to judicial review is, at any rate in the absence of an administrative remedy, not to be construed as a denial of authority

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to the aggrieved person to seek appropriate relief in the federal courts in the exercise of their general jurisdiction. When Congress passes an Act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted. This permits the courts to participate in law enforcement entrusted to administrative bodies only to the extent necessary to protect justiciable individual rights against administrative action fairly beyond the granted powers. The responsibility of determining the limits of statutory grants of authority in such instances is a judicial function entrusted to the courts by Congress by the statutes establishing courts and marking their jurisdiction. *Cf. United States vs. Morgan*, 307 U. S. 183, 190, 191, 83 L. Ed. 1211, 1216, 1217, 59 S. Ct. 795. This is very far from assuming that the courts are charged more than administrators or legislators with the protection of the rights of the people. Congress and the executive supervise the acts of administrative agents. The powers of departments, boards and administrative agencies are subject to expansion, contraction or abolition at the will of the legislative and executive branches of the government. These branches have the resources and personnel to examine into the working of the various establishments to determine the necessary changes of function or management. *But under Article 3, Congress established courts to adjudicate cases and controversies as to claims of infringement of individual rights whether by unlawful action of private persons or by the exertion of unauthorized administrative power." Stark vs. Wickard*, 321 U. S. 288 (309-10).

See also *Crowell vs. Benson*, 285 U. S. 22 (49), 76 L. Ed. 598 (611); *Wadley S. R. Co. vs. Georgia*, 235 U. S. 651 (660), 59 L. Ed. 405 (411); *American School of Magnetic Healing vs. McAnnulty*, 187 U. S. 94 (107-109), 47 L. Ed. 90

(95-96); *I. C. C. vs. Illinois Central Railway*, 215 U. S. 452 (470), 54 L. Ed. 280 (288); and *NG Fung Ho vs. White*, 259 U. S. 276 (284-5), 66 L. Ed. 938 (943), where the court said:

> "To deport one who so claims to be a citizen obviously deprives him of liberty, as was pointed out in *Chin Yow vs. United States*, 208 U. S. 8, 13, 52 L. Ed. 369, 370, 28 Sup. Ct. Rep. 201. It may result also in loss of both property and life; or of all that makes life worth living. Against the danger of such deprivation *without the sanction afforded by judicial proceedings*, the 5th Amendment affords protection in its guaranty of due process of law. The difference in security of judicial over administrative action has been adverted to by this court. Compare *United States vs. Woo Jan*, 245 U. S. 552, 556, 62 L. Ed. 466, 467, 38 Sup. Ct. Rep. 207; *White vs. Chin Fong*, 253 U. S. 90, 93, 64 L. Ed. 797, 798, 40 Sup. Ct. Rep. 449."

Passing now to a group of cases where the court has held that statutory administrative procedure satisfied the due process requirements of the Constitution because the statute provided for judicial review, we point out the following:

> "Neither constitution requires that exercise of such a power be preceded by the adoption of regulations. And neither constitution requires that there must be a hearing of the applicant before the board may exercise a judgment under the circumstances and of the character here involved. The requirement of due process of law is amply safeguarded by §2 of the statute, which provides:
>
> "'From the refusal of said department to issue a certificate of registration for any cosmetic preparation appeal shall lie to the superior court in the

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County of Kennebec or any other county in the state from which the same was offered for registration.'

"Compare *Hagar vs. Reclamation Dist.*, 111 U. S. 701, 711, 712, 28 L. Ed. 569, 573, 574, 4 S. Ct. 663; *Hall vs. Geiger-Jones Co.*, 242 U. S. 539, 554, 61 L. Ed. 480, 490, 37 S. Ct. 217, L.R.A. 1917F, 514, Ann. Cas. 1917C, 643; *Bragg vs. Weaver*, 251 U. S. 57, 59, 64 L. Ed. 135, 137, 40 S. Ct. 62; *Phillips vs. Commissioner of Internal Revenue*, 283 U. S. 589, 597, 75 L. Ed. 1289, 1297, 51 S. Ct. 608; *State vs. McCann*, 59 Me. 383, 385; *Bennett vs. Davis*, 90 Me. 102, 106, 37A. 864; *McInnes vs. McKay*, 127 Me. 110, 116, 141A. 699, 279 U. S. 820, 73 L. Ed. 975, 49 S. Ct. 344." *Bourjois vs. Chapman*, 301 U. S. 183 (189-90).

"The procedural provisions of the Act are assailed. But these provisions, as we construe them, do not offend against the constitutional requirements governing the creation and action of administrative bodies. See *Interstate Commerce Commission vs. Louisville & N. R. Co.*, 227 U. S. 88, 91, 57 L. Ed. 431, 433, 33 S. Ct. 185. The Act establishes standards to which the Board must conform. There must be complaint, notice and hearing. The Board must receive evidence and make findings. The findings as to the facts are to be conclusive, but only if supported by evidence. *The order of the Board is subject to review by the designated court, and only when sustained by the court may the order be enforced.* Upon that review all questions of the jurisdiction of the Board and the regularity of its proceedings, all questions of constitutional right or statutory authority are open to examination by the court. We construe the procedural provisions as affording adequate opportunity *to secure judicial protection against arbitrary action* in accordance with the well-settled rules applicable to administrative agencies set up by Congress to aid in the enforcement of valid legislation. It is not necessary to repeat these rules which have frequently been de-

> clared. None of them appears to have been transgressed in the instant case." *National Labor Relations Board vs. Jones & Laughlin Steel Corporation,* 301 U. S. 1 (46-7).
>
> "The Emergency Court has power to review all questions of law, including the question whether the administrator's determination is supported by evidence, and any question of the denial of due process or any procedural error appropriately raised in the course of the proceedings. No reason is advanced why petitioners could not, throughout the statutory proceeding, raise and preserve any due process objection to the statute, the regulations, or the procedure, *and secure its full judicial review* by the Emergency Court of Appeals and this court. Compare *White vs. Johnson,* 282 U. S. 367, 374, 75 L. Ed. 388, 394, 51 S. Ct. 115." *Yakus vs. United States,* 321 U. S. 414 (437).

See also *Dobson vs. Commissioner of Internal Revenue,* 320 U. S. 489 (501), 88 L. Ed. 248 (256); *Bowles vs. Willingham,* 321 U. S. 503 (520), 88 L. Ed. 892 (906); *Lockerty vs. Phillips,* 319 U. S. 182 (188-9), 87 L. Ed. 1339 (1343); *The Kentucky Railroad cases,* 115 U. S. 321 (335), 29 L. Ed. 414 (418); and *Reconstruction Finance Corporation vs. Bankers Trust Company,* 318 U. S. 163 (170-171), 87 L. Ed. 680 (687), where the construction and constitutionality of one section of the Bankruptcy Act was challenged in a proceeding for the reorganization of a railroad. The section involved was Section 77 (c) (12) which authorized the Interstate Commerce Commission to make a determination with respect to compensation to be paid parties to reorganization proceedings pending in the Bankruptcy Court. The court construed the Act as authorizing the Commission in the first instance to determine the amount of the compensation, subject to review by the Bankruptcy

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Court to determine whether or not the Commission's findings of fact are supported by evidence. The court then said:

> "This construction of the Act leaves the court free to decide upon the basis of the Commission's report all questions of law. With respect to the amount set as a maximum the only question of law which can arise is whether there is substantial evidence to support the Commission's finding. If there is not the court may so hold, set aside the finding and return the matter to the Commission. Under the terms of the subsection the judge's action upon the claim is subject to appeal independently of other issues, to the Circuit Court of Appeals.
>
> "*Thus* understood, we find no infirmity in the statute. The commital to the Commission of the fact finding office raises no substantial question under the Fifth Amendment. In actions at law a jury is the traditional trier of facts, whose function as such is preserved and guaranteed by the fundamental law. But courts of equity, of admiralty and of bankruptcy, by themselves and their mandatories examine and decide disputed questions of fact; and no reason is perceived why claims of the sort here involved should not be litigated, as are other claims against bankrupt estates, by such machinery and in such manner as Congress shall prescribe, *saving to the claimant* the right of notice and hearing, *and such review as is provided by the statute as we construe it.*
>
> "At law the jury's verdict settles issues of fact and defines rights, subject only to questions of law. In administrative procedure, the findings of the administrative body may likewise be made conclusive of fact issues, and equally define rights and duties subject only to questions of law. No question is made as to the competency of the Interstate Commerce Commission to appraise evidence and to draw an in-

formed and intelligent conclusion as to what is a maximum reasonable compensation for services rendered. Indeed, since most of the services are performed in connection with its activities it is probably in a better position to judge of their value to the reorganization than any court or other fact-finding instrumentality.

"To prescribe a method of trial of facts, *subject to a court's supervision in matters of law,* is not, as respondent suggests, to destroy vested rights, but to provide a method of appraising and liquidating them."

In *Ex Parte Young,* 209 U. S. 123, 52 L. Ed. 714, and *Oklahoma Operating Company vs. Love,* 252 U. S. 332, 64 L. Ed. 596, and several other cases it was held that a statute which permitted judicial review only at the risk of incurring substantial penalties if the order sought to be reviewed was upheld was insufficient to provide the due process of law guaranteed by the Constitution. If a law which permits judicial review only by running the risk of incurring penalties does not afford due process, how can it be said that a statute which permits no review affords due process of law?

This entire field of judicial review, as applied to orders of the Interstate Commerce Commission, was considered by this court in *Interstate Commerce Commission vs. Louisville & Nashville Railroad Co.,* 227 U. S. 88, 57 L. Ed. 431, 433, in the following language:

"On the appeal here, the government insisted that while the Act of 1887 to regulate commerce (24 Stat. at L. 379, §§14-16, chap. 104, U. S. Comp. Stat. Supp. 1911, p. 1284) made the orders of the Commission only prima facie correct, a different result followed from the provision in the Hepburn Act of 1906 (34

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Stat. at L. 584, §4, chap. 3591, U. S. Comp. Stat. Sup. 1911, p. 1297), that rates should be set aside if after a hearing the 'Commission shall be of the opinion that the charge was unreasonable.' In such case it insisted that the order based on such opinion is conclusive, and (though *Interstate Commerce Commission vs. Union P. R. Co.*, 222 U. S. 547, 56 L. Ed. 311, 32 Sup. Ct. Rep. 108, was to the contrary) could not be set aside, even if the finding was wholly without substantial evidence to support it.

"1. But the statute gave the right to a full hearing, and that conferred the privilege of introducing testimony, and at the same time imposed the duty of deciding in accordance with the facts proved. A finding without evidence is arbitrary and baseless. And if the government's contention is correct, it would mean that the Commission had a power possessed by no other officer, administrative body, or tribunal under our government. It would mean that, where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority, however beneficently exercised in one case, could be injuriously exerted in another, is inconsistent with rational justice, *and comes under the Constitution's condemnation of all arbitrary exercise of power.*

"In the comparatively few cases in which such questions have arisen it has been distinctly recognized that administrative orders, *quasi judicial in character,* are void if a hearing was denied; if that granted was inadequate or manifestly unfair; if the finding was contrary to the 'indisputable character of the evidence' (*Tang Tun vs. Edsell,* 223 U. S. 681, 56 L. Ed. 610, 32 Sup. Ct. Rep. 359; *Chin Yow vs. United States,* 208 U. S. 13, 52 L. Ed. 370, 28 Sup. Ct. Rep. 201; *Low Wah Suey vs. Backus,* 225 U. S. 468, 56 L. Ed. 1167, 32 Sup. Ct. Rep. 734; *Zakonaite vs. Wolf,* 226 U. S. 272, ante, 218, 33 Sup. Ct. Rep. 31),

or if the facts found do not, as a matter of law, support the order made (*United States vs. Baltimore & O. S. W. R. Co.*, 226 U. S. 14, ante, 104, 33 Sup. Ct. Rep. 5; *Cf. Atlantic Coast Line R. Co. vs. North Carolina Corp. Commission*, 206 U. S. 20, 51 L. Ed. 942, 27 Sup. Ct. Rep. 585; *Wisconsin, M. & P. R. Co. vs. Jacobson*, 179 U. S. 301, 45 L. Ed. 201, 21 Sup. Ct. Rep. 115; *Washington ex rel. Oregon R. & Nav. Co. vs. Fairchild*, 224 U. S. 510, 56 L. Ed. 863, 32 Sup. Ct. Rep. 535; *Interstate Commerce Commission vs. Illinois C. R. Co.*, 215 U. S. 470, 54 L. Ed. 287, 30 Sup. Ct. Rep. 155; *Southern P. Co. vs. Interstate Commerce Commission*, 219 U. S. 433, 55 L. Ed. 283, 31 Sup. Ct. Rep. 288; *Muser vs. Magone*, 155 U. S. 247, 39 L. Ed. 137, 15 Sup. Ct. Rep. 77).

"2. The government's claim is not only opposed to the ruling in *Interstate Commerce Commission vs. Union P. R. Co.*, 222 U. S. 547, 56 L. Ed. 311, 32 Sup. Ct. Rep. 108, and the cases there cited, but is contrary to the terms of the Act to regulate commerce, which in its present form provides (25 Stat. at L. 861, §6, chap. 382, U. S. Comp. Stat. 1901, p. 3168), for methods of procedure before the Commission that 'conduce to justice.' The statute, instead of making its orders conclusive against a direct attack, expressly declares that they may 'be suspended or set aside by a court of competent jurisdiction.' 36 Stat. at L. 551, §12, chap. 309. Of course, that can only be done in cases presenting a justiciable question. But whether the order deprives the carrier of a constitutional or statutory right, whether the hearing was adequate and fair, or whether for any reason the order is contrary to law—are all matters within the scope of judicial power.

"3. Under the statute the carrier retains the primary right to make rates, but if, after hearing, they are shown to be unreasonable, the Commission may set them aside and require the substitution of just for unjust charges. The Commission's right to act

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depends upon the existence of this fact, and if there was no evidence to show that the rates were unreasonable there was no jurisdiction to make the order. *Interstate Commerce Commission vs. Northern P. R. Co.,* 216 U. S. 544, 54 L. Ed. 609, 30 Sup. Ct. Rep. 417. In a case like the present the courts will not review the Commission's conclusions of fact (*Interstate Commerce Commission vs. Delaware, L. & W. R. Co.,* 220 U. S. 251, 55 L. Ed. 456, 31 Sup. Ct. Rep. 392), by passing upon the credibility of witnesses or conflicts in the testimony. *But the legal effect of evidence is a question of law. A finding without evidence is beyond the power of the Commission.* An order based thereon is contrary to law, and must, in the language of the statute, be 'set aside by a court of competent jurisdiction.' 36 Stat. at L. 551, chap. 309."

If a shipper succeeds in obtaining an order for reparation from a carrier the carrier is at liberty to disregard the order. In such case the shipper, in order to collect, must bring an action at law under Section 16 (2) of the Act and the order of the Commission is only prima facie evidence of the shipper's right to recover which may be refuted by the carrier and the effect of which is to have an entire retrial of the case on the merits if the carrier desires it. *Meeker vs Lehigh Valley Railroad,* 236 U.S. 412 and *Bullock vs. Chicago, B. & Q. R. Co.,* 19 Fed. Supp. 862.

We are not attacking the constitutionality of Section 9 of the Interstate Commerce Act. We are not claiming that this section, properly construed, deprives plaintiff of its property without due process of law. What we are claiming and what we do assert is that under the construction of this section adopted by the lower court, the section would deprive plaintiff of its property without due process of law and that the court is bound to reject such a con-

struction of the statute and to adopt instead a construction that judicial review of an order of the Interstate Commerce Commission is not a suit for damages under Section 9 of the Act.

Under Article III, Section 1 of the Constitution the judicial power of the United States is vested in one Supreme Court and in such inferior courts as Congress may establish. Section 2 of Article III states that the judicial power "shall extend to all cases in law and in equity arising under this Constitution, the laws of the United States and treaties made or which shall be made under their authority."

The nature of this power has been determined by this court in several cases. In *Interstate Commerce Commission vs. Brimson*, 154 U. S. 477 (475, 476), this court said:

> "What is a case or controversy to which, under the Constitution, the judicial power of the United States extends? Referring to the clause of that instrument, which extends the judicial power of the United States to all cases in law and equity arising under the Constitution, the laws of the United States, and treaties made or that shall be made under their authority, this court, speaking by Chief Justice Marshall, has said: 'This clause enables the judicial department to receive jurisdiction to the full extent of the Constitution, laws, and treaties of the United States when any question respecting them shall assume such a form that the judicial power is capable of acting on it. That power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case, and the Constitution declares that the judicial power shall extend to all cases arising under the Constitution,

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> laws and treaties of the United States.' *Osborn vs. Bank of the United States,* 9 Wheat. 738, 819. And in *Murray vs. Hoboken Co.,* 18 How. 272, 284, Mr. Justice Curtis, after observing that Congress cannot withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty, nor, on the other hand, bring under judicial power a matter which, from its nature, is not a subject for judicial determination, said: 'At the same time there are matters involving public rights which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which Congress may or may not bring with the cognizance of the courts of the United States, as it may deem proper.' So, in *Smith vs. Adams,* 130 U. S. 173, Mr. Justice Field, speaking for the court, said that the terms 'cases' and 'controversies' in the Constitution embraced 'the claims or contentions of litigants brought before the courts for adjudication by regular proceedings established for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs'."

In *Interstate Commerce Commission vs. Illinois Central Railroad Company,* 215 U. S. 452 (470), this court, in holding that the power to review an order of the Interstate Commerce Commission as to constitutional and statutory powers (including an unreasonable exercise of authority), was "of the essence of judicial authority, and which therefore may not be curtailed," said:

> "Beyond controversy, in determining whether an order of the Commission shall be suspended or set aside, we must consider, (a) all relevant questions of constitutional power or right; (b) all pertinent questions as to whether the administrative order is within the scope of the delegated authority under

which it purports to have been made; and, (c) a proposition which we state independently, although in its essence it may be contained in the previous one, viz., whether, even although the order be in form within the delegated power, nevertheless it must be treated as not embraced therein, because the exertion of authority which is questioned has been manifested in such an unreasonable manner as to cause it, in truth, to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power. *Postal Telegraph Cable Company vs. Adams,* 155 U. S. 688, 698. Plain as it is that the powers just stated are of the essence of judicial authority, and which, therefore, may not be curtailed, and whose discharge may not be by us in a proper case avoided, it is equally plain that such perennial powers lend no support whatever to the proposition that we may, under the guise of exerting judicial power, usurp merely administrative functions by setting aside a lawful administrative order upon our conception as to whether the administrative power has been wisely exercised.

"Power to make the order and not the mere expediency or wisdom of having made it, is the question."

In *Alton Railroad Company vs. United States of America,* 287 U. S. 229 (237-240), this court said:

"An order of the Commission which denies relief in part, or which dismisses the complaint, may be reviewed by a court. Intermountain Rate Cases (*United States vs. Atchison, T. & S. F. R. Co.,* 234 U. S. 476, 490, 58 L. Ed. 1408, 1423, 34 S. Ct. 986; *United States vs. New River Co.,* 265 U. S. 533, 539-541, 68 L. Ed. 1165, 1171, 1172, 44 S. Ct. 610). To annul the order would not, as in *Lehigh Valley R. Co. vs. United States,* 243 U. S. 412, 61 L. Ed. 819,

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37 S. Ct. 397, merely leave unchanged the very situation which the Commission's order refused to alter. Here the Alton, by virtue of the pre-existing agreement for divisions, would secure a measure of protection simply from the annulment of the order. To take jurisdiction would not be tantamount to usurpation by the court of the functions of the Commissions. The court is not called upon here, as it was in *Manufacturers R. Co. vs. United States,* 246 U. S. 457, 483, 62 L. Ed. 831, 844, 38 S. Ct. 383, and *Standard Oil Co. vs. United States,* 283 U. S. 235, 241, 75 L. Ed. 999, 51 S. Ct. 429, to afford relief which the Commission, in the exercise of its powers, had found that the complainant was not entitled to receive. The court is not asked to prescribe reasonable divisions, or to direct that they be prescribed by the Commission. *The court is asked to find that the Commission denied the Alton a constitutional right as a result of acting upon erroneous principles of law, and therefore to enjoin that part of the order.*

"The determination of the questions presented is properly within the scope of judicial review of the Commission's orders. The questions are not the correctness of its conclusion as to the reasonableness of the divisions, or the correctness of its findings as to any of the factors which the Act directs it to consider in determining reasonableness. The question is the correctness of the legal principles adopted by the Commission as a basis for reaching a conclusion from its findings. The Commission reasoned that since the particular transportation services of the Alton herein in question were not of importance to the public, and since the Alton was in substance an intermediate, not an originating carrier, it might be denied a compensatory share of the existing joint rates with the defendant carriers. Whether the 'importance to the public of the transportation services of such carriers,' as specified in the Act, means the importance of the particular

services in question, and whether a carrier not participating in joint rates with inbound roads is an 'intermediate line' within the meaning of the section dealing with divisions, are questions upon which a court may properly pass. So, too, is the more fundamental question whether, assuming the Commission was correct in its construction of the Act, it follows that a non-compensatory share of existing joint rates may be imposed. Upon these questions the Alton was entitled to invoke the judgment of the court. Compare *Southern R. Co. vs. St. Louis Hay & Grain Co.*, 214 U. S. 297, 301, 53 L. Ed. 1004, 1006, 29 S. Ct. 678; *Southern P. Co. vs. Interstate Commerce Commission*, 219 U. S. 433, 449, 55 L. Ed. 283, 288, 31 S. Ct. 298."

To the same effect is *Interstate Commerce Commission vs. Union Pacific Railroad Company*, 222 U. S. 541 (547), where the court said:

"There has been no attempt to make an exhaustive statement of the principle involved, but in cases thus far decided, it has been settled that the orders of the Commission are final unless (1) beyond the power which it could constitutionally exercise; or (2) beyond its statutory power; or (3) based upon a mistake of law. But questions of fact may be involved in the determination of questions of law, so that an order, regular on its face, may be set aside if it appears that (4) the rate is so low as to be confiscatory and in violation of the constitutional prohibition against taking property without due process of law; or (5) if the Commission acted so arbitrarily and unjustly as to fix rates contrary to evidence, or without evidence to support it; or (6) if the authority therein involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance, and not the shadow, determines the validity of the exer-

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cise of the power. *Int. Com. Com. vs. Ill. Cent.*, 215 U. S. 452, 470; *Southern Pacific vs. Int. Com. Com.*, 219 U. S. 433; *Int. Com. Com. vs. Northern Pacific*, 216 U. S. 538, 544; *Int. Com. Com. vs. Alabama Midland Ry. Co.*, 168 U. S. 144, 174.

> "In determining these mixed questions of law and fact, the court confines itself to the ultimate question as to whether the Commission acted within its power. It will not consider the expediency or wisdom of the order, or whether, on like testimony, it would have made a similar ruling. 'The findings of the Commission are made by law *prima facie* true, and this court has ascribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience.' *Ill. Cent. vs. I. C. C.*, 206 U. S. 441. Its conclusion, of course, is subject to review, but when supported by evidence is accepted as final; not that its decision, involving as it does so many and such vast public interests, can be supported by a mere scintilla of proof—but the courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order."

And in *Intermountain Rate Cases*, 234 U. S. 476 (490-491), the existence of judicial power to correct wrongs done by an abuse of authority of an administrative body was held to be necessarily implied, saying:

> "It is of course true as pointed out in *Interstate Commerce Commission vs. Illinois Central Railroad*, 215 U. S. 452, 470, and since repeatedly applied that findings of fact made by the Commission within the scope of its administrative duties must be accepted in case of judicial review, but that doctrine, as was also pointed out, does not relieve the courts in a proper case from determining whether the Constitution has been violated or whether statutory powers

conferred have been transcended or have been exercised in such an arbitrary way as to amount to the exertion of authority not given, doctrines which but express the elementary principle that an investiture of a public body with discretion does not imply the right to abuse but on the contrary carries with it as a *necessary* incident the command that the limits of a sound discretion be not transcended which by necessary implication carries with it the existence of *judicial* power to correct wrongs done by such excess."

Finally, in *Federal Power Commission vs. Pacific Power and Light Company,* 307 U. S. 156 (159-160), the court said:

"But it is urged that review of the Power Commission's order does not present a 'case' or 'controversy,' because the court itself cannot lift the prohibition of the statute by granting permission for the transfer, nor order the Commission to grant such permission. And so it is claimed that any action of a court in setting aside the order of the Commission would be an empty gesture, since without permission a transfer would be unlawful. But this proves too much. In none of the situations in which an action of the Interstate Commerce Commission or of a similar Federal regulatory body comes for scrutiny before a Federal court can judicial action supplant the discretionary authority of a Commission. A Federal court cannot fix rates nor make divisions of joint rates nor relieve from the long-short haul clause nor formulate car practices. So here it is immaterial that the court itself cannot approve or disapprove the transfer. The court has power to pass judgment upon challenged principles of law insofar as they are relevant to the disposition made by the Commission. '• • • a judgment rendered will be a final and indisputable basis of action between the Commission and the defendant.' *Interstate Commerce Commission vs. Baird,* 194 U.

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> S. 25, 38, 48, L. Ed. 860, 866, 24, S. Ct. 563. In making such a judgment the court does not intrude upon the province of the Commission, while the constitutional requirements of 'case' or 'controversy' are satisfied. For purposes of judicial finality there is no more reason for assuming that a Commission will disregard the direction of a reviewing court than that a lower court will do so."

This principle of the constitutional right of judicial review is so firmly established and has been applied by this court so many times in cases involving orders of the Interstate Commerce Commission that the intention of Congress in adopting Section 9 of the Interstate Commerce Act cannot be misunderstood. As we stated earlier, Section 9 of the Interstate Commerce Act does not seem to us to be open to the construction that it bars a suit to determine whether or not the Interstate Commerce Commission has acted within the scope of its authority. It does not seem to us that the words "suit for damages" were intended to embrace a suit to review an order of the Commission on constitutional grounds or that a prohibition against a resort to both a suit for damages and an action before the Commission expressed any intention to preclude a judicial examination of the action of the Commission. If, however, the Act can be so construed, it seems improbable to us that such a construction is the one Congress intended because, had Congress intended to deprive a person of the right to judicial review of an order of the Commission denying his complaint, it would have been a simple matter for Congress to have said so plainly and unequivocally. Finally, where the language of a statute permits two constructions, Congress will always be presumed to have intended that construction which renders the Act constitutional rather than that which

violates both the spirit and the letter of the Constitution, particularly on a matter so fundamental as the right to a hearing in court. In view of all of this we respectfully assert that if *Standard Oil Company vs. United States* held that a suit might not be brought under the Urgent Deficiencies Act to review an order of the Interstate Commerce Commission dismissing on the merits a complaint filed before it to recover damages under Section 9 of the Interstate Commerce Act, *Standard Oil Company vs. United States* is erroneous and on this point should be overruled now in order to complete the work started in *Rochester Telephone Corporation vs. United States* but which could not there be completed because of the limitations of the controversy then before the court.

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THE MERITS

The District Court made no decision on the merits of this case. Neither the Commission nor the railroad defendants in their motions have given this court any detailed analysis of the testimony before the Commission. These defendants rely almost entirely on brief references to a deposition of one Lt. Dippold in support of their claim that the plaintiff has no case on the merits and that even if this court should decide that the district court should have taken jurisdiction of the case, there is no merit to this controversy and, therefore, the motions to affirm should be granted.

In addition to the deposition of Lt. Dippold, there was a very voluminous record before the Commission. The hearing before the Examiner lasted nearly three full days, many witnesses testified and upwards of 80 exhibits were introduced. Plaintiff respectfully submits that a decision on the merits, in the absence of a decision by the District Court, should be made only after an examination of the entire record before the Commission and a careful analysis of the tariffs involved in this case.

It is not our intention in this brief to analyze all of the evidence before the Commission or to attempt to argue the merits fully. Inasmuch as the defendants who filed the motions have dealt with certain phases of the merits of the case, we shall answer these and at the same time set forth some of the principal points as to why we believe the decision of the Commission was erroneous, in an effort to convince the court that there are very substantial ques-

tions involved in this case and that we should have a full opportunity to present our case in the light of the complete record.

The shipments in question arose out of purchase orders received by plaintiff from the Navy Department for steel buildings known as Quonset buildings for housing personnel at overseas bases. Steel parts for this purpose were manufactured in plants at Detroit and Jackson, Michigan, and Jamestown, N. Y., and shipped by rail for further fabrication to a plant leased for that purpose by plaintiff at Mansfield, Ohio. After fabrication the parts were shipped from Mansfield by rail to ocean ports for shipment overseas.

Before leasing the Mansfield, Ohio, plant, plaintiff explained the circumstances to the railroads and requested the necessary tariff amendments to provide for fabrication in transit and reshipment from Mansfield. The amendments were duly filed and published in accordance with the provision of the Interstate Commerce Act.

Transit is the right of a shipper or transit house operator to stop a shipment at an intermediate point and change its form or substance and afterwards to reship the commodity so changed to a point of final destination under an arrangement by which instead of paying as freight charges the sum of the local rate from point of origin to transit point and from transit point to point of ultimate destination, the freight charges are computed on the basis of the through rate from point of origin to point of ultimate destination plus an additional charge known as a transit charge but the total of which is less than the sum of the two local rates. The practice was adopted to

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enable manufacturers to meet competitive situations. *Cottonseed, Its Products, and Related Articles,* 188 I. C. C. 605, 646. *Transit On Cottonseed at Quauah, Texas,* 232 I. C. C. 183, 188.

The benefit of transit privileges under the tariffs in question is given to a transit operator such as plaintiff whether or not the outbound shipment from the transit point was owned by or shipped in the name of another, and two alternative methods of settlement are provided for. Under the first method, the transit operator may bill the shipment forward at the through rate from the point of origin to ultimate destination, plus the transit charge, less the amount of inbound rate to the transit station. Under the second method, the transit house operator or the shipper may file a claim at the end of the month for a refund of a portion of the inbound charges paid. If this claim method is used, then in the first instance, the full local rate is paid on both the inbound movement from the point of origin to the transit station and on the outbound movement from the transit station to the ultimate destination. The amount of the refund under this method to which the transit house operator or shipper is entitled is the difference between the combination of local rates and the through rate from point of origin to destination, plus the transit charge. Under the tariffs, the transit house operator or shipper must elect one of the two methods of settlement.

Under its arrangement with the Navy, the plaintiff sold the Quonset huts f.o.b. Mansfield and received Government bills of lading, partly in blank, for use in shipment from Mansfield to various ocean ports. Under applicable regulations, the use of the Government bills of lading forms

connoted payment by the Government of freight charges on the outbound shipments from Mansfield on the basis of any optional rates available to the Government. Plaintiff accordingly used the second or "claim" method of settlement. It paid the full local rate on the inbound movements from origin points to the transit point at Mansfield and complied with the regulations necessary to entitle it to claim an adjustment on the basis of the difference between the combination of local rates and the through rate from points of origin to coastal destination points.

In connection with the use of these Government bills of lading forms, the entire control of the outbound shipment at Mansfield, including the election of the transit privilege, was left to the plaintiff. The plaintiff was named as shipper on the bill of lading. It filled in the description of the material loaded and marked the bill of lading with the customary word "transit" to indicate that the tariff transit privilege had been claimed. It characterized the shipment for "export," designated outbound routing from blanket specifications given to it by the transportation officer who issued the blank forms to it, and filled in all other parts of the bill of lading necessary to complete the contract of carriage under applicable tariffs. The plaintiff had full responsibility for all local shipping arrangements necessary to place the material on board cars. It took charge of all such matters in connection with all shipments involved.

All of the shipments moved from Mansfield to the various seaports without any interruption in the physical continuity of the shipment and without any communicated indication of any kind passing between plaintiff, the Navy or the carrier of any intention to change or waive the elec-

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tion to take advantage of the transit privilege as made by the plaintiff on both inbound and outbound bills of lading.

One of the reasons given by the railroads for rejecting plaintiff's claim was that under the published tariffs the right to claim the benefit of the transit privilege was predicated upon the use of commercial rates for the outbound shipment from Mansfield, and that since settlement for these shipments was made by the Government on rates made available only to the Government, the tariffs did not apply. There is nothing whatever in the tariffs to support this contention. The specific requirement was that the outbound shipment be charged the "lawful rates" from transit to destination. Admittedly, all rates paid by the Government for outbound movement were lawful rates. Contrary to various inferences in the record, either the full commercial export rate from Mansfield to the port of embarkation or the domestic rate was paid in the majority of cases, these rates being equally or more beneficial to the shipper than other rates available exclusively to the Government. Clearly, there is no evidence whatsoever to justify the rejection of plaintiff's claim on this ground.

The principal argument now advanced by the Commission and the carriers is that the Government was in control of shipments from Mansfield and could and did elect to waive the right of the plaintiff to a readjustment of the freight charges as permitted by the transit privilege under the tariffs. Thus, quoting from the Commission's report:

> "* * * It was the purpose of the Navy Department to make new shipments from Mansfield, independent of the inbound movements. * * *

"The continuity of the shipments under consideration was terminated at the transit point when the Navy Department, which became the owner of the goods when they were loaded on cars at Mansfield, elected to ship them from that point as separate and independent shipments. Control of the shipments from the transit point passed from complainant to the new owner (the Navy Department), who paid, or will pay, freight charges on the basis of the rates, as modified by Section 22 quotations or subject to landgrant deductions, from the transit point to final destinations. Complainant, having lost control of the goods, could not restore the continuity of the shipments, and is not entitled to readjustment of the charges on the basis of the through rates from the points of origin to the final destinations."

And quoting from the intervening railroads' motion to affirm:

"It will not be disputed that the Commission had before it a deposition by the naval officer in charge of the shipments from Mansfield that the Navy intended to make new and independent shipments from that point. (By doing so it was able to get favored rates under Section 22 of the Interstate Commerce Act—which allows lower-than-tariff rates to the United States and certain others—and under the land grant statutes which were then in effect and which operated to reduce charges on Government shipments only). Again, it will not be disputed that the transportation from Mansfield to destination took place under Government bills-of-lading, i.e., contracts of transportation to which the only parties were the Government and the railroads and to which, therefore, Great Lakes was a stranger. These facts, in themselves, show that there was substantial evidence to support the Commission's finding that the appellant lost control of the shipments at Mansfield and that the shipments from

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> Mansfield were new and independent shipments unrelated to the transportation to Mansfield."

And quoting from the motion of the Interstate Commerce Commission to affirm:

> "• • • The Commission's findings that title passed to the Government and that it had complete control of the outbound shipments is amply supported by the evidence. There is need but to point out the deposition of Lieut. Dippold to support these findings."

Navy Lieut. Dippold, above referred to, was not the contracting officer who executed the purchase orders with the plaintiff for the Quonset huts in question. He had no authority to act for the Navy in determining the applicability of tariffs to the shipments in question. He had nothing to do with payment of freight charges on shipments moving out of Mansfield on Government bills of lading. These charges were paid to the delivering railroads by other Governmental agencies. Lieut. Dippold was the transportation officer, Advance Base Division, Bureau of Yards and Docks, of the Navy Department at Chicago, Illinois, in charge of the routing of traffic, issuing of ODT permits and the handling of general transportation matters. His office issued the blank bills of lading with his typewritten signature and took care of the blanket routing of shipments from Mansfield manufactured by the plaintiff.

Proposed routes were originally prepared by plaintiff and with some changes were approved by the Navy and in many instances provided for a choice of several different routes. Specific instructions were never given to route a particular shipment over certain railroads and the selec-

tion of the various approved routes was made by plaintiff. (126, 127, 225) Lt. Dippold testified as follows:

> "Q. (After calling attention to the different forms of bills of lading.) Are Government bills of lading issued at any time covering a movement by a commercial shipper? That is, any bills of lading that you issue, are they issued in such a way that they can be used to make a shipment by any commercial shipper?
>
> A. That is right. They can, yes.
>
> Q. What is the purpose of showing on that bill of lading that it was shipped from the Great Lakes Steel Corporation?
>
> A. That is the name of the shipper. They are the actual shippers.
>
> Q. Well, I do not understand that a Government bill of lading can be issued and have transported on it merchandise for a commercial shipper. Has my understanding been wrong?
>
> A. That is shipping in accordance with purchase order on Government bills of lading material that we have purchased." (Deposition, 4-5.)

Lieutenant Dippold then testified that the Government purchased the property at Mansfield, Ohio, the shipping point, and acquired title to the goods at that point so that when the merchandise moved it was merchandise belonging to the Government and not to the plaintiff. The purpose in showing on the bill of lading that the goods moved from plaintiff's plant or that it was shipped by plaintiff was to help the Navy identify the material from a lot of other points from where shipments were being made. He filled in the name of the shipper on each bill of lading. (Deposition, 5-6.)

He was then asked this question by Mr. Cole, attorney for the Baltimore and Ohio Railroad:

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"Q. Was it or was it not the desire and aim of the Bureau of Yards and Docks in preparing such Government bills of lading, showing Mansfield as the shipping point, to make separate, distinct and new shipments from that point independent of any transportation matters that may be connected with the inbound movement or movement of materials into Mansfield prior to it being worked up into the condition in which it was being shipped out on the bill of lading?"

to which he answered:

"A. To the best of my recollection, yes."

Then followed:

"Q. (by Mr. Kaier): That is 'yes' new shipments were intended?
A. (Witness indicates 'yes.')
Mr. Cole: He is shaking his head 'yes.'
The Witness: New shipments were intended." (Deposition, 10-11.)

He then testified that on behalf of the Navy he had furnished instructions to the plaintiff showing how the shipments were to be routed. In issuing such instructions, one of his duties was to spread the traffic to different destinations. He was concerned with the net rates paid by the Government and bore in mind, in the routing instructions issued, the idea of land grant deductions. His name was typed on all the bills of lading issued by him. He identified the eleven representative bills of lading as having been issued by him. (Deposition, 11-13.)

He was then asked this question by Mr. Kaier, attorney for the Pennsylvania Railroad Company:

"Q. When you say that the Great Lakes Steel Corporation is the shipper, Lieutenant, I take it you

> mean that they physically make the shipment on behalf of the Navy Department, and that they are shown for the reasons which you explained in your testimony as the shipper on the bill of lading?"

To which he answered:

> "That's right." (Deposition, 13-14.)

Lieutenant Dippold further testified that the Navy had no ownership of the material purchased from plaintiff until the material was loaded into the freight car and the bill of lading had been signed by the carrier and that the Navy's only interest in the transportation was the payment of the freight rate from Mansfield. The bills of lading sent in by him to plaintiff were more or less in blank, indicating only the appropriation chargeable, the issuing office, the name and title of the issuing officer, the contract or purchase order number and its date and his typed signature. The Navy had no means of knowing what shipments would be covered by the bills of lading until the cars were loaded. (Deposition, 15-33.)

By the above testimony, the Commission and railroads seek to justify the Commission's finding that an election to change the characteristics of these shipments was made by the Navy Department and plaintiff's claim thereby destroyed. This testimony was totally incompetent. In response to a leading question, the witness merely stated that to the best of his recollection separate and new shipments from Mansfield were intended by the Bureau of Yards and Docks. There is no evidence that this Bureau or Lieut. Dippold were authorized to formulate such an intention. There is no evidence that this intention was communicated either to plaintiff or the railroads. There is no evidence whatever that even in the secrecy of Lieutenant

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Dippold's mind this intention ripened into an attempted waiver by the Navy Department of the transit privilege. On the contrary, the election of this privilege had been made by the plaintiff and a notation of the exercise of such election was made on the Government bills of lading furnished to the plaintiff. It was Lt. Dippold's testimony that there was no objection on the part of the Government to Great Lakes Steel Corporation using the transit privilege. Thus quoting further from Lieutenant Dippold's testimony on cross-examination:

> "Q. There is no objection to the government with respect to the transit operation, is there?
>
> A. No.
>
> Q. In other words, if the transit tariffs lawfully provide for transit privileges on these materials that were shipped out, there is no objection on the part of the government to the Great Lakes Steel Corporation using that transit privilege, is there?
>
> A. No; because we want the material, and, in accordance with the purchase order, it would have to be transited to be manufactured."

The bill of lading bore a direction that the original must be sent to the consignee immediately and this was done (223). While the record does not specifically cover the point, they are obviously used by the Navy Department auditors in auditing the freight bills for payment (171, 176). When all of these facts are considered, Lt. Dippold's general statement that the Government intended to make independent shipments from Mansfield can be seen in its true perspective. What Lt. Dippold obviously meant was that the Government was not particularly interested in the shipments from points of origin to Mansfield. The routes were laid out with a view to application of the transit privilege. Regardless of who may have been the technical

shipper, the actual shipper, Great Lakes Steel Corporation, placed on the outbound bills of lading before delivery to the carriers a notation that the transit house operator had elected to take the benefit of the transit privilege. These bills of lading were then forwarded to the Navy, the freight bills audited and the freight charges eventually paid by the Government. It is not claimed that either Lt. Dippold or anyone else had any reason for breaking the continuity of the shipments at Mansfield, nor that any benefit would have accrued to the Government for having done so. As Lt. Dippold said, the Government had no objection to the use by plaintiff of the transit privilege provided for in the tariffs. While in answer to an involved, leading and abstract question, Lt. Dippold testified that the desire of the Bureau of Yards and Docks was to make separate, distinct and new shipments from Mansfield, it obviously was not the desire of either Lt. Dippold or any Government agency that such shipments be sufficiently separate, distinct or new as to break any continuity that may have been required under the transit tariffs.

Both the Commission and the railroads in their motions call attention to no evidence other than the deposition of Lt. Dippold claimed to support the findings of the Commission and its conclusion that the transit tariffs were not applicable. Assuming the correctness of the finding that it was the intention of the Navy to make new shipments from Mansfield and that the Navy and not the plaintiff was in control of the shipments from Mansfield to the rail destinations on the coast, such findings can only support the Commission's conclusion if, because of such change in control, it destroyed the transit privilege under the provisions of the tariffs in issue.

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As stated above, the tariffs of all three railroads provide alternative methods of settlement. The simpler of the two methods is to forward the shipment from the transit point at the balance of the through rate. The rules relating to this method of obtaining the transit privilege do not require the transit house operator to prepay the freight from the transit point. The transit house operator, under this method of settlement, may either prepay the freight or sell the shipment f.o.b., the transit point freight charges collect, which is the same option any shipper has under any railroad freight tariff. If the shipper prepays the freight he normally retains title to the shipment and control over it until delivery to the consignee. If the shipment is sold f.o.b. the shipping point, then title and control normally pass to the consignee upon delivery to the carrier.

Under the claim method of shipment the transit house operator has far more complicated rules with which to comply. Although to collect his claim he must submit to the carrier *the original paid inbound freight bill,* under the plain wording of the tariffs he is not required to present *the outbound paid freight bill,* but only a copy of the bill of lading to show that the shipment moved forward from the transit point. If, as a prerequisite to obtaining the transit privilege, the transit house operator is required to retain title to and control over the shipment from the transit station, then the purpose of having two methods of settlement disappears. Obviously the alternative methods are set forth in the tariffs in order to permit the operator either to sell his product f.o.b. his plant, in which case he would select the claim method of settlement, or f.o.b. the consignee's delivery point in which case, paying the outbound freight rate, he would forward the shipment

at the balance of the through rate. Regardless of which method is used and whether or not title passes to the consignee at the transit point or at destination, the transportation service performed by the carrier is exactly the same, no greater, no less. Neither the passage of title and control, nor the intention of the consignee would justify the carrier in charging a higher rate for the identical service performed.

There is not a single reference in any of the tariffs involved in this case to shipments that move forward on a Government bill of lading, nor do the tariffs attempt in any way to distinguish between shipments to the Government and to commercial consignees. The evidence in this case fails to establish that there was any difference in the handling of the shipments to the Navy than there would have been had the shipments been made to a commercial consignee except that the Government bill of lading was used and that in some few instances, but only to the Gulf ports, land grant rates rather than the full domestic or export rates were paid. In the absence of a provision in the tariffs to the effect that the transit privilege is not available on shipments on Government bills of lading, the decision of the Commission in effect writes either one or both of the following provisions into the tariffs:

> (a) The transit privilege herein provided is not available to the transit house operator if the shipment moves forward from the transit point on a Government bill of lading and the material is sold to the Government f.o.b. the transit point.
>
> (b) If the shipment is sold f.o.b. the transit point the transit house operator may only claim the transit privilege if he retains title to and control over the

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shipment until it is delivered to the consignee at destination.

A careful examination of the tariffs cannot result in any such interpretation.

If the theory of transit is analyzed, neither the passage of title to and control over the shipment at the transit point nor the "desire and aim" of the consignee, be it a Governmental agency or a commercial buyer, has anything to do with the granting or withholding of the privilege.

It is common knowledge that the combination of local intermediate rates is higher in almost all cases than the through rate between a point of origin and destination. Thus the fabricator or miller who is located at a point between the origin of the raw material and the market in which he sells his product is at a disadvantage over the producer located either at the origin point or market. There is no such thing as continuity of a shipment of raw material into a transit point and a fabricated product from the transit point to ultimate destination. Transit is a pure fiction that was written into railroad tariffs to grant to the producer at the intermediate point the same rate paid by the producer located either at the origin of the raw material or the market plus a small charge for handling the car at the transit point.

In the final analysis the freight paid, whether paid by the fabricator or by the fabricator's customers, is a part of the cost of the goods and must be borne ultimately by the customer. It is hard to conceive how it could be the "desire and aim" of the consignee to destroy the fiction of transit and to insist that the local inbound and outbound rates should apply to a shipment instead of a much lower rate, since to do so would increase the price to the

consignee unless, as a result of competition, the fabricator could be forced to absorb such differential. But even if this is the result, it can make no difference to the consignee because it would not make the price to him any lower than it would have been had the transit privilege been available to the fabricator.

The big gap in the evidence of Lt. Dippold is that there is no explanation of what the Navy Department would have accomplished by considering the shipments as originating at Mansfield. By so doing, the Navy could not gain anything except to increase the cost of the material by the additional freight that was paid. There was only one possible advantage that the Navy could have had from so doing: if, after the shipments left Mansfield, they were forwarded to some point for storage or for further fabrication before going forward to the coastal port, at which intermediate point a separate transit privilege would have been available to the Navy, the total rate from Mansfield would have been lower because the tariffs prohibited the granting of more than one transit privilege. Such, however, was not the case. The evidence conclusively establishes that all shipments went directly from Mansfield to the ports where the material was shipped overseas. There is not even any evidence that the Navy diverted or reconsigned a single shipment among all the thousands that went forward from Mansfield or in any way "controlled" the shipment beyond accepting delivery and paying the freight charges.

If the "desire and aim" of the Navy had been to consider the shipments as transit shipments, there would have been no difference whatsoever in the facts nor in the transportation service performed by the carriers. By answering "yes" instead of "no" to the leading question

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put to him by the attorney representing one of the railroads, the net result under the Commission's decision is that the railroads have saved thousands of dollars without any evidence to show that the Navy had anything whatsoever to gain through taking the position the railroad's attorney was so anxious for him to take. This position was taken nearly three years after shipments were started and after thousands of cars had been shipped under bills of lading calling attention to the fact that the transit privilege was claimed and after thousands of bills had been paid by the Government without any objection being raised by the Government to the plaintiff's right to claim this privilege.

For many years this court, the District Courts and the Commission have consistently followed the rule that the railroads, in drafting their tariffs, are presumed to have used all the words necessary to make them clear to the shippers and if there is any ambiguity or doubt in the tariff's meaning it should be construed in favor of the shipper and against the carrier.

Union Wire Rope Corp. vs. A. T. & S. F. Ry. Co., 66 Fed. (2) 965. Certiorari denied 290 U. S. 686;

Scrap Tin Plate vs. Minnesota and Illinois, 256 I. C. C. 15, 19;

Swalstig vs. B. & O. Railroad Co., 255 I. C. C. 125.

The Commission, in deciding this case, has not only ignored this rule in toto, but has written a meaning into the tariffs that cannot be obtained from any reasonable interpretation of any single rule or of the entire tariff of any of the three railroads involved.

The Commission, in its report, has cited only one case, *Cudahy Packing Co. vs. Baltimore & O. R. Co.*, 263 I. C. C. 503, as authority for its decision. This case was decided in 1945, by the same division of the Commission that decided plaintiff's case. No appeal was taken. The facts in the Cudahy case are quite different from those in this case. The Government bills of lading outbound from the transit point were prepared in the Cudahy case by a Federal agency (War Food Administration) and designated the Federal Surplus Commodities Corporation, and not the transit operator, as shipper. There was nothing to show that the transit operator or the Cudahy Company had complied with the tariff rules relating to shipments that move forward in the name of another party for commercial reasons. Furthermore, the Government agency involved in the Cudahy case intended to accord additional transit services beyond the original transit point and so notified both the Cudahy Packing Company and the railroad company as follows:

> "• • • These shipments purchased from Cudahy Packing Company f.o.b. car Washington Court House, Ohio. Bills of lading were prepared by War Food Administration and as far as this administration was concerned the shipments originated at Washington Court House. Any subsequent transit stops would be considered subject to through rates from Washington Court House, Ohio, to ultimate destinations."

When the Cudahy Packing Co. received the shipments of eggs at the transit point it did not know what disposition would later be made of those shipments. As we have pointed out above, no such facts are present in the case at bar.

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The evidence conclusively establishes that the plaintiff complied with every rule of the transit tariffs. It is true that because of the complexity of the claim method of settlement there was some confusion at first, but, at the suggestion of the railroads, plaintiff worked closely with the Central Inspection and Weighing Bureau, the agency set up by the carriers to police its tariff requirements, for nearly six months after the plant began operations, at the end of which time the Bureau wrote a letter to plaintiff saying that plaintiff's records and claims were in strict accordance with the rules. Contrary to the situation in the Cudahy case, with the knowledge and consent of the Navy and the railroads, plaintiff, and not the Navy, was designated as the shipper on each bill of lading.

Plaintiff contends that there was no substantial evidence before the Commission to support its findings that the plaintiff lost control of the goods, that the continuity of the shipments under the transit tariffs was terminated at the transit point, or that the Navy was the shipper or elected or had the right to elect to make new shipments from the transit point independent of the transit privileges; that such finding is contrary to the evidence and that such finding, even if supported by evidence, does not support the conclusion that plaintiff was not entitled to the benefits of the transit tariffs; that in the interpretation placed on the tariffs the Commission has not applied correct legal principles but on the contrary has arbitrarily placed an unwarranted interpretation on the tariffs in utter disregard of the plaintiff's rights and, therefore, the decision of the Commission should be set aside and the Commission directed to rehear the case and to proceed under correct legal principles.

CONCLUSION

We believe we have demonstrated beyond doubt that the questions involved on this appeal are much more than substantial both on the jurisdictional question and on the merits. A much more conclusive showing that the Commission acted arbitrarily and without substantial evidence and contrary to law can be made when the entire record of the proceeding before the Commission is before this court. Such a showing was made to the District Court but the District Court, in view of its decision on the jurisdictional question, declined to pass on the merits. If, as we believe, our case is of such a nature as to confer jurisdiction on the court to hear it, then it would seem that we are entitled to a full hearing on the question in some court, whether it be the District Court or this court, and not to have the matter summarily decided on a motion to affirm the judgment of the lower court which did not decide the matter at all.

On the jurisdictional question we believe we have shown conclusively that the District Court had jurisdiction of this case under the Urgent Deficiencies Act. We are certain that in enacting the Interstate Commerce Act, Congress did not intend to deprive a shipper of the right to review an order of the Commission on the ground that the Commission had acted arbitrarily or without substantial evidence or in excess of its authority. To have done so would have been directly contrary to the policy which Congress has always followed as shown by the cases we have cited. This policy of Congress has been further demonstrated recently in the enactment of the Administrative Procedure Act of June 11, 1946.

While the lower court held that since Section 9 of the Interstate Commerce Act as construed by the District

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Court precluded review of the particular order here in question, plaintiff was not entitled to review under the Administrative Procedure Act, the policy of Congress to permit the examination of orders of administrative bodies generally is set forth in Section 10 of the Administrative Procedure Act. This section permits judicial review of *any* agency action except where the discretion of the agency is involved or Congress itself has provided in a particular case that judicial review may not be had.

The language in *Standard Oil Company vs. United States* has resulted in a great deal of uncertainty among members of the bar. The memorandum opinions of this court in *Ashland Coal and Ice Company vs. United States* and *George Allison and Company vs. United States* have tended to add to, rather than clear up, this uncertainty and, as can be seen from the decision of the District Court in this case, have resulted in much confusion. While we are completely convinced of the soundness of our position on the jurisdictional question, we think that, in any event, the matter is of sufficient importance to the public to warrant positive action by this court. We respectfully suggest to the court that the uncertainty and confusion should be ended and the election of remedies theory clearly set forth by the court in a complete opinion, as was done with the negative order doctrine in the Rochester Telephone case, rather than by memorandum opinion.

Respectfully submitted,

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